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## A TREATISE

ON THE

# Law and Proceedings in Bankruptcy

 $\mathbf{BY}$ 

# FRANK O. LOVELAND

Clerk of the United States Circuit Court of Appeals for the Sixth Circuit; Author of "Forms of Federal Procedure," and "The Appellate Jurisdiction of the Federal Courts."

## VOLUME TWO

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#### CHAPTER XXVII.

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#### 8 533. Pending suits.

Pending suits.

A suit at law or in equity pending in a state or federal court at the time of bankruptcy does not abate upon the bankruptcy of one of the parties.1

The act of 1898 provides that the court may order the trustee to enter his appearance and defend any pending suit against the bankrupt, or, he may, with the approval of the court, be permitted to prosecute, as trustee, any suit commenced by the bankrupt prior to the adjudication with like force and effect as though it had been commenced by him.2

<sup>1</sup> Thatcher v. Rockwell, 105 U. S. 467, 26 L. Ed. 949; Hahlo v. Cole, 122 N. Y. App. Div. 636, 15 Am. B. R. 591; Griffin v. Mutual Life Ins. Co., 119 Ga. 664, 11 Am. B. R. 622; Des Moines Sav. Bank v. Morgan Jewelry Co., 123 Ia. 432, 12 Am. B. R. 781; Kessler v. Heaklotz, 132 N. Y. App. Div. 278, 22 Am. B. R. 257.

The act of 1867 provided that the assignee might prosecute or defend any pending action to which the bankrupt was a party. cases under that act established the doctrine that the validity of a pending suit or of the judgment

or decree thereon was not affected by the intervening bankruptcy of one of the parties; that the assignee might or might not be made a party; and whether he was so or not, he was equally bound with any other party acquiring an interest pendente litc. R. S. Sec. 5047; Norton v. Switzer, 93 U. S. 355, 23 L. Ed. 903; Hill v. Harding, 107 U. S. 631, 27 L. Ed. 493; Thatcher v. Rockwell, 105 U. S. 467, 26 L. Ed. 949; Boynton v. Ball, 121 U. S. 457, 30 L. Ed. 985. <sup>2</sup> B. A. 1898, Secs. 11b and c; Miller v. New Orleans Fertilizer Co., 211 U. S. 496, 53 L. Ed. 300,

A trustee should obtain leave of the court of bankruptcy either to prosecute or defend a suit pending by or against the bankrupt,<sup>3</sup> but want of authority from the court of bankruptcy is not necessarily fatal.<sup>4</sup>

An order to intervene in a state court may be granted on a petition or motion filed in the bankruptcy proceedings. The form of the order, if granted, may be to authorize the trustee to apply to the state court to be substituted as a party in place of the bankrupt.<sup>5</sup> The granting or refusing leave to intervene rests in the descretion of the bankruptcy court.<sup>6</sup> If the result is likely to be beneficial to the estate, leave to prosecute it will be granted. If the trustee, representing the creditors, is not likely to obtain anything for the estate in such suit, leave should be denied. The plaintiff is usually entitled to have a trustee made a party defendant to a pending suit, whether he is directed to make an active defense or not.<sup>7</sup> If he makes no defense after notice, but permits a pending suit to proceed in the name of the bankrupt, he is bound by any judgment that may be rendered.<sup>8</sup>

Whether a state court will grant leave to the trustee to intervene and be substituted as a party in a pending suit rests

— Am. B. R. 416; Pennsylvania R. Co. v. International Coal Min. Co. (C. C. A. 3d Cir.), 173 Fed. Rep. 1, 8, 97 C. C. A. 383; Hahlo v. Cole, 112 N. Y. App. Div. 639, 15 Am. B. R. 591; Victor Talking Mach. Co. v. Hawthorne & Sheble Mfg. Co., 173 Fed. Rep. 617, 23 Am. B. R. 234; Weston, etc., Co. v. American Instrument Co., 169 Fed. Rep. 659.

Miller v. New Orleans Fertilizer
Co., 211 U. S. 495, 53 L. Ed. 300, 21
Am. B. R. 416; Kessler v. Herklotz, 132 N. Y. App. Div. 278, 22
Am. B. R. 257; Hahlo v. Cole, 112 N. Y. App. Div. 636, 15 Am. B. R. 591; *In re* Price, 92 Fed. Rep. 987, 1 Am. B. R. 419.

<sup>4</sup> Miller v. New Orleans Fertilizer Co., 211 U. S. 496, 53 L. Ed. 300, 21 Am. B. R. 416.

In re Price, 92 Fed. Rep. 987, 1
Am. B. R. 606; Hahlo v. Cole,
112 N. Y. App. Div. 636, 15 Am.
B. R. 591.

<sup>6</sup> Griffin.v. Mutual Life Ins. Co., 119 Ga. 644, 11 Am. B. R. 622; Hahlo v. Cole, 112 N. Y. App. Div. 636, 15 Am. B. R. 591; In re Klein, 97 Fed. Rep. 31, 3 Am. B. R. 174; In re Porter & Bros., 109 Fed Rep. 111, 6 Am. B. R. 259; In re Haensell, 91 Fed. Rep. 355, 1 Am. B. R. 286; Victor Talking Mach. Co. v. Hawthorne & Sheble Mfg. Go., 173 Fed. Rep. 617, 23 Am. B. R. 234.

<sup>7</sup> Victor Talking Mach. Co. v. Hawthorne & Sheble Mfg. Co., 173 Fed. Rep. 617, 23 Am. B. R. 234; Weston, etc., Co. v. American Instrument Co., 169 Fed. Rep. 659.

<sup>8</sup> Thatcher v. Rockwell, 105 U. S.

Thatcher v. Rockwell, 105 U. S.
467, 26 L. Ed. 949; Linstroth Wagon Co. v. Ballew (C. C. A.
5th Cir.), 149 Fed. Rep. 960, 79 C.
C. A. 470, 18 Am. B. R. 23.

Adjudication of bankruptcy does not divest the state court of jurisdiction where the trustee does not intervene to proceed to a final dein the discretion of the state court and may be denied in a proper case.9 The fact that the act provides for suits by the trustee does not limit his right to appear in any suit.10

If a suit in the name of the bankrupt is settled and dismissed after bankruptcy proceedings are instituted the trustee may move to have the case reinstated.11 The bankrupt may sue out a writ of error or take an appeal to review a judgment or decree rendered against him after the commencement of bankruptcy proceedings. 12 Where the judgment or decree is rendered before the bankruptcy proceedings are begun, the trustee is the proper person to prosecute or defend the suit in an appellate court.13

A judgment against a substituted trustee is not entitled to be paid in full, but may be proved and receive dividends pro rata with other claims.14 Costs in such cases have been allowed in full,15 but not where trustee did not intervene.16 If there is a recovery in a case brought by the bankrupt and any question arises as to the right of the trustee or creditors to the money, such right will be protected.17

#### § 534. Suits against trustees.

In the course of the settlement of a bankrupt estate it may become necessary for persons, who are not parties to the bank-

cree. Vance v. Lane's Trustee, 26 Ky. L. Rep. 619, 82 S. W. 297.

<sup>9</sup> National Distilling Co. v. Seydel, 103 Wis. 489, 79 N. W. Rep. 744; Bank of Commerce v. Elliott, 109 Wis. 648.

As to the practice in applying to the state court by the trustee, see the rule laid down by Judge Shiras in Heath v. Shaffer, 93 Fed. Rep. 647, 2 Am. B. R. 98.

10 Friedman v. Vorchofsky, 105 Ill. App. 414.

11 Home Ins. Co. v. Hollis, 53 Ga. 659. See also Herndon v. Howard. 9 Wall. 664, 19 L. Ed. 809; Knox v. Exchange Bank, 12 Wall. 379, 20 L. Ed. 287.

12 Dormire v. Cogly, 8 Blackf. (Ind.) 177; O'Neil v. Dougherty, 46 Cal. 575; Collins v. Marshall, 10 Rob. (La.) 112.

<sup>18</sup> Herndon v. Howard, 9 Wall. 664, 19 L. Ed. 809; Knox v. Exchange Bank, 12 Wall. 379, 20 L. Ed. 287; Day v. Laflin, 47 Mass. 280; Sandford v. Sandford, 58 N. Y. 67; Vairin v. Edmonson, 9 Ill. 120; Moffit v. Cruise, 7 Cold. (Tenn.) 137.

 Norton v. Switzer, 93 U. S.
 355, 23 L. Ed. 903; In re Neely,
 108 Fed. Rep. 371, 5 Am. B. R. 836. <sup>15</sup> In re Neely, 108 Fed. Rep. 371,
 5 Am. B. R. 836.

16 Kessler v. Herklotz, 132 N. Y. App. Div. 278, 22 Am. B. R. 257. 17 Griffin v. Mutual Life Ins. Co., 119 Ga. 664, 11 Am. B. R. 622.

ruptcy proceedings, to resort to litigation to assert a right, title or interest against the trustee.

It is not necessary to first obtain leave of the court of bankruptcy before bringing a suit against the trustee in a state or federal court.1

Where the property, in which the claimant seeks to assert a right, title or interest, has passed to the trustee, he regularly intervenes in the bankruptcy proceedings and litigates his claim in the court of bankruptcy.<sup>2</sup> The reason for this practice is that a judgment or decree obtained in a court other than that having custody of the property can be executed only by order of the court of bankruptcy. An intervention of this character is a "controversy in bankruptcy" as distinguished from a proceeding in bankruptcy.8 The practice is similar to that upon an intervening petition in a suit in equity. The manner of proceeding in such cases is pointed out in another place.4

An independent suit may be brought in a court of bankruptcy, irrespective of citizenship or amount in dispute, to enforce a claim against property in the custody of the court. Such a suit may be maintained on the theory that it is ancillary to the bankruptcy proceedings.<sup>5</sup> The jurisdiction of the court of bankruptcy extends to determining controversies in

<sup>1</sup> In re Smith 121 Fed. Rep. 1014, 9 Am. B. R. 603.

As to suing a receiver without leave, see In re Kalb & Berger Mfg. Co. (C. C. A. 2d Cir.) 165 Fed. Rep. 895, 91 C. C. A. 573, 21 Am. B. R. 393, and cases cited in the opinion.

<sup>2</sup> Hewit v. Berlin Mach. Wks., 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709; Knapp\*v. Milwau-kee Trust Co., 216 U. S. 545, 54 L. Ed. 610, 24 Am. B. R. 76; White v. Schloerb, 174 U. S. 542, 44 L. Ed. 1183, 4 Am. B. R. 178; Murphy v. Hofman Co., 211 U. S. 562, 53 L. Ed. 327, 21 Am. B R. 487; Keegan v. King, 96 Fed. Rep 758, 3 Am. B. R. 79; In re Russell (C. C. A. 2d Cir.), 101 Fed. Rep-248, 41 C. C. A. 323, 3 Am. B. R. 658; In re Chambers, Calder &

Co., 98 Fed. Rep. 865, 3 Am. B. R. 224; In re Emslie (C. C. A. 2d Cir.), 102 Fed. Rep. 291, 42 C. C. A. 350, 4 Am. B. R. 126; In re Whitener (C. C. A. 5th Cir.), 105 Fed. Rep. 180, 44 C. C. A. 434, 5 Am. B. R. 198; Fisher v. Cushman (C. C. A. 1st Cir.), 103 Fed. Rep. 860, 43 C. C. A. 381, 4 Am. B. R. 654.

<sup>3</sup> Sec. 829, *post*. Hewit v. Berlin Mach. Wks., 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709; Knapp v. Milwaukee Trust Co., 216 U. S. 545, 54 L. Ed. 610, 24 Am. B. R. 76.

4 Sec. 412, ante, and Sec. 829,

<sup>5</sup> Wabash Railroad v. Adelbert College, 208 U. S. 38, 54; Murphy v. Hofman Co., 211 U. S. 562, 569, 53 L. Ed. 327, 21 Am. 487.

relation to property within the custody of the court.<sup>6</sup> A bill will lie to recover money paid to the trustee by mistake.<sup>7</sup>

A suit at law or in equity may be brought against a trustee by an adverse claimant in the district court when the jurisdictional requisites exist. Section 23 of the act applies to controversies between the trustee, as such, and adverse claimants without regard to which brings the suit. In such cases the matter in controversy must exceed, exclusive of interest and costs, the sum or value of \$3,000, and involve a federal question or diversity of citizenship. Diversity of citizenship must exist between the bankrupt and the claimant, the citizenship of the trustee being immaterial.<sup>10</sup>

A trustee may be sued in a state court in an action not involving the possession or seizure of property in the custody of a court of bankruptcy.<sup>11</sup> Such are actions for trover or trespass,<sup>12</sup> or to procure the reformation of a written contract made by the plaintiff and the bankrupt before bankruptcy.<sup>13</sup>

<sup>6</sup> In Whitney v. Wenman, 198 U. S. 539, 553, 49 L. Ed. 1157, 14 Am. B. R. 45, speaking of a bill by the trustee, Mr. Justice Day said, "Nor can we perceive that it makes any difference that the jurisdiction is not sought to be asserted in a summary proceeding, but resort is had to an action in the nature of a plenary suit, wherein the parties can be fully heard after the due course of equitable procedure."

<sup>7</sup> Carpenter v. Southworth (C.

C. A. 2d Cir.), 165 Fed. Rep. 428, 91 C. C. A. 378, 21 Am. B. R. 390. 

<sup>8</sup> B. A. 1898, Sec. 23. 'Sec. 71, ante. Chattanooga Nat. Bank v. Rome Iron Wks., 99 Fed. Rep. 82, 3 Am. B. R. 582; Hatch v. Curtin, 146 Fed. Rep. 200, 16 Am. B. R. 625.

<sup>9</sup> Sec. 24 of the judicial code, act of March 3, 1911, 36 Stat. at L. 1087.

10 Sec. 75, ante. B. A. 1898
 Sec. 23. Bush v. Elliott, 202 U. S. 477, 50 L. Ed. 1114, 15 Am. B. R. 656

<sup>11</sup> In re Platteville Foundry & Mach. Co., 147 Fed Rep. 828, 17 Am. B. R. 291, cited with approval

in Frank v. Vollkommer, 205 U. S. 521, 529, 51 L. Ed. 911, 17 Am. B. R. 806; Davis v. Friedlander, 104 U. S. 570, 26 L. Ed. 818; Eyster v. Gaff, 91 U. S. 521, 23 L. Ed. 403; Skilton v. Codington, 185 N. Y. 80; Bindseil v. Smith, 61 N. J. Eq. 645; Zartman v. First Nat. Bank, 216 U. S. 134, 54 L. Ed. 418, 23 Am. B. R. 635; In rc Spitzer (C. C. A. 2d Cir.), 130 Fed. Rep. 879, 66 C. C. A. 35, 12 Am. B. R. 346; In re Russell (C. C. A. 2d Cir.), 101 Fed. Rep. 248, 41 C. C. A. 323, 3 Am. B. R. 653; In re Kanter & Cohen (C. C. A. 2d Cir.), 121 Fed. Rep. 984, 58 C. C. A. 260, 9 Am. B. R. 372.

<sup>12</sup> In re Platteville Foundry & Machine Co., 147 Fed. Rep. 828, 17 Am. B. R. 291; In re Spitzer (C. C. A. 2d Cir.), 130 Fed. Rep. 879, 66 C. C. A. 35, 12 Am. B. R. 346; In re Russell (C. C. A. 2d Cir.), 101 Fed. Rep. 248, 41 C. C. A. 323, 3 Am. B. R. 658; In re Kanter & Cohen (C. C. A. 2d Cir.), 121 Fed. Rep. 984, 58 C. C. A. 260, 9 Am. B. R. 372.

<sup>18</sup> Zartman v. First Nat. Bank,
 216 U. S. 134, 54 L. Ed. 418, 23
 Am. B. R. 635.

The state courts are without power to render any judgment which invades or disturbs the possession of the property while in the custody of the court of bankruptcy.<sup>14</sup> Such suits, for example replevin, will be stayed.<sup>15</sup> The provisions of the bankrupt act are binding upon the state as well as the federal courts.<sup>16</sup>

In some districts the tendency has been to compel all actions relating to the title to property in custodia legis to be litigated in the bankruptcy court. It is clearly within the discretion of the court of bankruptcy to permit such suits to proceed in the state court where there is no interference with its possession and it is more conducive to the ends of justice not to interfere.<sup>17</sup>

A suit on the bond of a trustee may be prosecuted in a district court <sup>18</sup> or in a state court. <sup>19</sup>

An action will lie against a trustee to recover damages for a tort committed by him in certain cases.<sup>20</sup>

#### § 535. Authority to sue.

In the course of the administration of an estate in bankruptcy it may be necessary to resort to a suit for the purpose of collecting or reducing to money the property of the estate for which he is trustee,<sup>1</sup> or for the purpose of reclaiming or

14 Murphy v. Hofman Co., 211
U. S. 562, 53 L. Ed. 327, 21 Am.
B. R. 487; In re Russell (C. C. A. 2d Cir.), 101 Fed. Rep. 248, 41
C. C. A. 323, 3 Am. B. R. 658; McFarland Carriage Co. v. Solanus, 108 Fed. Rep. 532, 6 Am. B.
R. 221; In re Neely, 108 Fed. Rep. 371, 5 Am. B. R. 836.

15 In re Russell (C. C. A. 2d Cir.), 101 Fed. Rep. 248, 41 C. C. A. 323, 3 Am. B. R. 658; Murphy v. Hofman Co., 211 U. S. 562, 53 L. Ed. 327, 21 Am. B. R. 487; In re Empire Const. & Supply Co., 157 Fed. Rep. 495; 19 Am. B. R. 704.

<sup>16</sup> Thompson v. Ragan, 117 Ky. 577.

In Claffin v. Houseman, 93 U. S. 130, 136, 23 L. Ed. 833, Mr. Justice Bradley said: "The laws of the United States are laws in the sev-

eral states, and just as much binding on the citizens and courts thereof as the state laws are."

<sup>17</sup> In re Platteville Foundry & Mach. Co., 147 Fed. Rep. 828, 17 Am. B. R. 291, cited with approval in Frank v. Vollkommer, 205 U. S. 521, 529, 51 I. Ed. 911, 17 Am. B. R. 806; Skilton v. Codington, 185 N. Y. 80; In re Spitzer, 130 Fed. Rep. 879, 12 Am. B. R. 346: In re Kanter & Cohen (C. C. A. 2d Cir.), 121 Fed. Rep. 984, 58 C. C. A. 260, 9 Am. B. R. 372.

<sup>18</sup> U. S. v. Union Surety and Guaranty Co., 118 Fed. Rep. 482, 9 Am. B. R. 114.

<sup>19</sup> Alexander v. Union Surety and Guaranty Co. (N. Y. Sup. Ct. App. Div.), 11 Am. B. R. 32.

<sup>20</sup> See Sec. 362, ante.

<sup>1</sup> B. A. 1898, Sec. 47, clause 2.

recovering property or the value of such property as has been fraudulently conveyed 2 or to set aside a preference.3

The trustee must bring such suits either in the state or federal courts.<sup>4</sup> He can not assign to another his right to sue.<sup>4\*</sup> The right to bring such suits is expressly given to the trustee by the act.<sup>5</sup> By operation of the express terms of the act the right which before the adjudication in bankruptcy belonged to the creditors was taken from them and given to the trustee. When he asserts such rights he claims under them and not under the bankrupt.<sup>6</sup> His duties in this respect relate chiefly to the interests of the general creditors.<sup>7</sup>

<sup>2</sup> B. A. 1898, Sec. 70e, and Sec. 67e. See also Sec. 203, et seq., post.

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<sup>3</sup> B. A. 1898, Sec. 60b. See also Sec. 203, et seq., post.

<sup>4</sup> Frost v. Latham & Co., 181 Fed. Rep. 866, 25 Am. B. R. 313; Trimble v. Woodhead, 102 U. S. 647, 26 L. Ed. 290; Glenny v. Langdon, 98 U. S. 25, 24 L. Ed. 43; Allen & Co. v. Montgomery, 48 Miss. 101; In re Meyers, No. 9518 Fed. Cas., 2 Ben. 424; In re Gray, 47 App. Div. (N. Y.) 554, 3 Am. B. R. 647; Falco v. Kaupisch Creamery Co. (Ore.), 70 Pac. R. 286; Thompson v. First National Bank, 84 Miss. 54.

4\* Belding-Hall Mfg. Co. v. Lumber Co. (C. C. A. 6th Cir.), 175 C. C. A. 335, 99 C. C. A. 123, 23 Am. B. R. 595.

<sup>5</sup> B. A. 1898, Sec. 60b, Sec. 67e and Sec. 70e.

6 Dudley v. Easton, 104 U. S.
103, 26 L. Ed. 688; Mueller v.
Bruss, 112 Wis. 406, 8 Am. B. R.
442; Andrews v. Mather, 134 Ala.
358, 9 Am. B. R. 296; Beasley v.

Coggins, 48 Fla. 215, 12 Am. B. R. 355, 37 So. Rep. 213; Sheldon v. Parker, 66 Neb. 610, 630, 11 Am. B. R. 152, 169; Hood v. Blair St. Bank, 91 N. W. R. 701; Cox v. Wall & Huske, 132 N. C. 730, 44 S. E. 635; Crooks v. Stuart, 7 Fed. Rep. 800; Jones v. Smith, 38 Fed. Rep. 380.

In First Nat. Bank v. Staake, 202 U. S. 141, 50 L. Ed. 967, 15 Am. B. R. 639, the supreme court said: "The rule that the trustee takes the estate of the bankrupt in the same plight as the bankrupt held it is not applicable to liens, which although valid as to the bankrupt, are invalid as to creditors."

<sup>7</sup> McHenry v. La Societe Francaise, 95 U. S 58, 24 L. Ed. 370; Dudley v. Easton, 104 U. S. 99, 26 L. Ed. 668.

In Frank v. Vollkommer, 205 Ú. S. 521, 51 L. Ed. 911, 17 Am. B. R. 806, it was held that if the trustee must be considered to represent judgment creditors such representation will be presumed.

It is not necessary for the trustee to apply to the court of bankruptcy for leave to institute such suits.8

No previous demand is required in suits of this character. The commencement is itself a demand.9

A creditor can not maintain a suit to recover a fraudulent or preferential transfer after a trustee has been appointed. <sup>10</sup> It has been held that creditors may maintain such a suit until the trustee is appointed and that he should then be substituted as party plaintiff. <sup>11</sup>

The negligence or refusal of a trustee to bring a suit to set aside such a conveyance is not sufficient to entitle a creditor to maintain a suit in his own name. The proper remedy in such a case is an application to the court to compel the trustee to take requisite steps for the full and complete protection of the rights of his creditors. The trustee will not be required to

<sup>8</sup> Callahan v. Irsael, 186 Mass. 383; Chism v. Citizens Bank, 77 Miss. 599; Chism v. Bank of Friar's Point, 5 Am. B. R. 56; Travelers Ins. Co. v. Mann, 11 Am. B. R. 269, 272.

See also the observations of Judge Hammond *In re* Baber, 119 Fed. Rep. 520, 9 Am. B. R. 406.

<sup>9</sup> Kaufman v. Tredway, 195 U. S. 271, 49 L. Ed. 190, 12 Am. B. R. 682; Wright v. Skinner, 136 Fed. Rep. 694, 14 Am. B. R. 500; Johnston v. Forsythe Mercantile Co., 127 Fed. Rep. 845, 11 Am. B. R. 669; Capital National Bank v. Wilkerson, 36 Ind. App. 407, 75 N. E. 837; Goldberger v. Harlan, 33 Ind. App. 465, 67 N. E. 707; Barbour v. Priest, 103 U. S. 293, 26 L. Ed. 478.

Moyer v. Dewey, 103 U. S. 301,
 L. Ed. 394; Glenny v. Langdon,
 U. S. 20, 25 L. Ed. 43; King v. Dietz,
 Penn. St. 156; Lane v. Nickerson,
 Ill. 284; Lessure v. Weaver,
 Moyer v. Dewey,
 Langdon,
 Lane v. Nickerson,
 Jane v. Dietz,
 Lane v. Nickerson,
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 Lane v. D

<sup>11</sup> In Frost v. Latham & Co., 18!

Fed. Rep. 866, 25 Am. B. R. 313, Judge Toulman said: "He is the representative of the creditors of the bankrupt, and if he in any given case would have the right as their representative to institute a suit to set aside a fraudulent or preferential transfer, it seems to me it follows as a necessary consequence that such creditors are entitled to do so, also, in the absence of a trustee, and to maintain the same until such trustee shall have been chosen, when he would be entitled to become a party plaintiff in the suit,"

See also Guaranty Title & Trust Co. v. Pearlman, 144 Fed. Rep. 550, 16 Am. B. R. 461, and *In re* Schrom, 97 Fed. Rep. 760, 3 Am. B. R. 352. <sup>12</sup> Moyer v. Dewey, 103 U. S. 301, 26 L. Ed. 394; Glenny v. Langdon, 98 U. S. 20, 25 L. Ed. 43; King v. Dietz, 12 Penn. St. 156; Lane v. Nickerson, 99 Ill. 284.

See Glenny v. Langdon, 98 U.
 20, 25 L. Ed. 43.

sue for property unless the estate is likely to be benefited by the suit.<sup>14</sup>

A receiver in bankruptcy can not maintain a suit to recover property for the estate.<sup>15</sup>

# § 536. Jurisdiction of suits to set aside fraudulent and preferential transfers.

The trustee may bring a suit to recover property transferred in fraud of creditors or as a preference in a court of bankruptcy, or a state court, having jurisdiction of the parties and subject-matter.<sup>1</sup>

In respect to this class of suits the courts of bankruptcy and the state courts now have concurrent jurisdiction.<sup>2</sup> The bankrupt act did not divest the state courts of jurisdiction of suits of which they had full cognizance.<sup>3</sup> The bankrupt act, as amended, confers jurisdiction of suits for the recovery of property under sections 60b, 67e and 70e, upon the courts of bankruptcy without the defendant's consent.<sup>4</sup> It has been held

Houghton v. Stiner, 92 N. Y.
 App. Div. 171, 87 N. Y. Supp. 10.
 See Sec. 217, ante.

<sup>1</sup> As to jurisdiction of suits to recover property held by adverse claimants, see Sec. 37, ante. As to ancillary jurisdiction, see Sec. 35, ante.

<sup>2</sup> Section 60b, Sec. 67e and Sec. 70e, were amended by the act of February 5, 1903, 32 Stat. at L. 797, by adding to each section the words: "For the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened shall have concurrent jurisdiction."

Section 23 was at the same time amended to extend the jurisdiction of the courts of bankruptcy to suits for the recovery of property under Sec. 60b and Sec. 67e and by the act of June 25, 1910, 36 Stat. at L. 838, to suits for the recovery of property under Sec. 70e.

In Frank v. Vollkommer, 205 U. S. 521, 51 L. Ed. 911, 17 Am. B. R. 806, the court, speaking of a suit in a state court to set aside a mortgage as given in fraud of creditors, said: "The amendment (of 1903) gave the bankruptcy court concurrent and not exclusive jurisdiction."

Bardes v. Hawarden Bank, 178
U. S. 524, 44 L. Ed. 1175, 4 Am.
B. R. 163; Eyster v. Gaff, 91 U. S. 521, 23 L. Ed. 403; Frank v. Vollkommer, 205 U. S. 521, 529, 51
L. Ed. 911, 17 Am. B. R. 806.

<sup>4</sup> See Sec. 37, ante; B. A. 1898, Sec. 23b, as amended by the act of February 5, 1903, 32 Stat. at

that this is true even where the adjudication was before the passage of the amendment, authorizing such suits to be brought in courts of bankruptcy.<sup>5</sup>

Suits of this character in the state or bankruptcy courts are not dependent upon the amount involved or the citizenship of the parties.<sup>6</sup>

It is sometimes the case that the court of bankruptcy in which the original proceedings are pending can not obtain jurisdiction of the person and subject-matter for the reason that it is beyond the reach of its process. In such cases it is necessary to go into a court which has jurisdiction. The trustee may maintain such a suit in a court of bankruptcy in a district other than that in which the decree of bankruptcy was made.<sup>7</sup>

If brought in equity in the district court, the court of bankruptcy has the full powers of a court of equity to enforce equities between the parties, entertain cross bills and the like.<sup>8</sup>

L. 797, and the act of June 25, 1910, 36 Stat. at L. 838. Harris v. First Nat. Bank, 216 U.S. 382, 54 L. Ed. 528, 23 Am. B. R. 632; Horskins v. Sanderson, 132 Fed. Rep. 415, 13 Am. B. R. 101; In re Noel, 137 Fed. Rep. 694, 14 Am. B. R. 715; McNulty v. Feingold, 129 Fed. Rep. 1001, 12 Am. B. R. 338; Johnston v. Forsyth Mercantile Co., 127 Fed. Rep. 845, 11 Am. B. R. 669; McElvain v. Hardesty (C. C. A. 8th Cir.), 169 Fed. Rep. 31, 94 C. C. A. 399, 22 Am. B. R. 320; Howman v. Alpha Farms, 155 Fed. Rep. 380, 18 Am. B. R. 700.

<sup>6</sup> Pond v. New York Exchange
Bank, 124 Fed. Rep. 992, 10 Am.
B. R. 343; *In re* Knickerbocker, 121
Fed. Rep. 1004, 10 Am. B. R. 381.

But see *In re* Hartman, 121 Fed. Rep. 940, 10 Am. B. R. 387.

<sup>6</sup> Wright v. Skinner, 136 Fed. Rep. 694, 14 Am. B. R. 500,

7 Ancillary jurisdiction is expressly conferred by Sec. 2 of the act of June 25, 1910, 36 Stat. at L. 838. See also ancillary jurisdiction, Sec. 35, ante; Lawrence v. Lowrie, 133 Fed. Rep. 995, 13 Am. B. R. 297; In re Benedict, 140 Fed. Rep. 55, 15 Am. B. R. 232; In re Peiser, 115 Fed. 199, 7 Am. B. R. 690; Lathrop v. Drake, 91 U. S. 516, 23 L. Ed. 414; Sherman v. Bingham, No. 12762 Fed. Cas., 3 Clif. 552; Ex parte Martin, No. 9149 Fed. Cas., 5 Law Rep. 158.

8 Allen v. McMannes, 156 Fed.
Rep. 615, 19 Am. B. R. 276;
Ommen v. Talcott, 175 Fed. Rep. 261, 23 Am. B. R. 572.

#### § 537. Jurisdiction of suits to collect debts, etc.

Suits by a trustee to collect a debt, or a promissory note or bond, or to recover damages for a breach of contract, or for an accounting and the like, may be brought by the trustee in a state court having general jurisdiction of such controversies.<sup>1</sup>

Such suits can not be maintained in a court of bankruptcy, except by consent of the defendant.<sup>2</sup> The reason is that the jurisdiction of suits brought by the trustee in bankruptcy to assert a title to money or property as assets of the bankrupt against strangers to those proceedings is limited to suits to recover property transferred in fraud of creditors or as a preference, unless by consent of the proposed defendant.<sup>3</sup>

The courts of bankruptcy are vested with jurisdiction by the proposed defendant's consent to entertain any suit brought by the trustee.<sup>4</sup> It is not necessary that the proposed defendant's consent should be in writing or upon the record in express terms. He will be presumed to consent if he appears and pleads to the merits and will not be allowed thereafter to

<sup>1</sup> Drew v. Myers, 81 Neb. 750, 22 Am. B. R. 656; Monroe v. Bushnell, 158 Mich. 115, 22 Am. B. R. 587; Callahan v. Israel, 186 Mass. 383; Bardes v. Hawarden Bank, 178 U. S. 524, 44 L. Ed. 1175, 4 Am. B. R. 163; Frank v. Volikommer, 205 U. S. 521, 51 L. Ed. 911, 17 Am. B. R. 806.

<sup>2</sup> B. A. 1898, Sec. 23b; Harris v. First Nat. Bank, 216 U. S. 382, 54 L. Ed. 528, 23 Am. B. R. 632; In re Haley (C. C. A. 6th Cir.), 158 Fed. Rep. 74, 85 C. C. A. 404. 19 Am. B. R. 313; Drew v. Myers. 81 Neb. 750, 22 Am. B. R. 636; Plaut v. Gorham Mfg. Co., 174 Fed. Rep. 852, 23 Am. B. R. 42; Hull v. Burr, 153 Fed. Rep. 945, 18 Am. B. R. 541; Lynch v. Bronson, 177 Fed. Rep. 605, 24 Am. B. R. 513.

<sup>8</sup> B. A. 1898, Sec. 23, as amended by the act of Feb. 5, 1903, 32 Stat. at L. 727, and the act of June 25, 1910, 36 Stat. at L. 838. Bardes v. Hawarden Bank, 178 U. S. 524, 44 L. Ed. 1175, 4 Am. B. R. 163; Bush v. Elliott, 202 U. S. 477, 50 L. Ed. 1114, 15 Am. B. R. 656; Harris v. First Nat. Bank, 216 U. S. 382, 54 L. Ed. 528, 23 Am. B. R. 632.

<sup>4</sup> Bardes v. Hawarden Bank, 178 U. S. 524, 44 L. Ed. 1175, 4 Am. B. R. 163; *In re* Durham, 114 Fed. Rep. 750, 8 Am. B. R. 115; Phillips v. Turner (C. C. A. 5th Cir.), 114 Fed. Rep. 726, 52 C. C. A. 358, 8 Am. B. R. 171; *In re* Blake, 150 Fed. Rep. 279, 17 Am. B. R. 668. object to the jurisdiction of the court <sup>5</sup> or withdraw his consent. <sup>6</sup> A stipulation to pay a fund into the registry of the court to be dealt with by that court, the rights of the parties to be determined upon summary petition, is not a consent to the jurisdiction of the court of a plenary suit. <sup>7</sup> A general appearance to a petition will not prevent the defendant from objecting to the jurisdiction of the court to an amended petition which for the first time states a case against him. <sup>8</sup> Proving a claim in bankruptcy as a secured debt is not such a consent as to give a court of bankruptcy jurisdiction of a controversy by the claimant to enforce such debt in a state court. <sup>9</sup>

Suits, not included in section 23b, of the act, must be prosecuted in the state court, unless "by consent of the proposed defendant," or unless they fall within the general jurisdiction vested in the district courts by the judicial code <sup>10</sup> as limited by section 23b of the bankrupt act. <sup>11</sup>

<sup>5</sup> In re Connolly, 100 Fed. Rep. 620, 3 Am. B. R. 842; In re Steuer, 104 Fed. Rep. 976, 5 Am. B. R. 209; In re Durham, 114 Fed. Rep. 750, 8 Am. B. R. 115; Ryttenberg v. Schefer, 131 Fed. Rep. 313, 11 Am. B. R. 652.

<sup>6</sup> In re Durham, 114 Fed. Rep. 750, 8 Am. B. R. 115; Mitchell v Mitchell, 147 Fed. Rep. 280, 17 Am. B. R. 382.

<sup>7</sup> Havens & Geddes Co. v. Pierek (C. C. A. 7th Cir.), 120 Fed. Rep. 244, 9 Am. B. R. 569.

See also Teschmacher v. Mrazay, 127 Fed. Rep. 728, 11 Am. B. R. 547.

<sup>8</sup> In re Hemby-Hutchinson Pub. Co., 105 Fed. Rep. 909, 5 Am. B. R. 569.

In Ex parte Comingor (C. C. A. 6th Cir.), 107 Fed. Rep. 898, 47 C. C. A. 51, 5 Am. B. R. 537, affirmed, 184 U. S. 18, 46 L. Ed. 413, 7 Am. B. R. 421, the circuit

court of appeals for the sixth circuit said: "It should be observed in this connection that the consent mentioned in Sec. 23b, means consent to the tribunal in which the controversy is carried on, and not to the mode of procedure, which is regulated by general principles of law unless other provision is made.

\* \* \* We are, therefore, inclined to think that this petitioner was not precluded from his right to raise the objection to the mode of proceeding at the time he did, which was before the making of the final order, and that the court erred in refusing to entertain it."

<sup>o</sup> Pickens v. Roy, 187 U. S. 177, 47 L. Ed. 128, 9 Am. B. R. 47.

<sup>10</sup> Act of March 3, 1911, 36 Stat. at L. 1087.

<sup>11</sup> See Sec. 71, ante, and Sec.538, post; Drew v. Myers, 81 Neb.750, 22 Am. B. R. 626; Bardes v.

It has been held that a controversy in which the trustee is not interested, although arising out of the bankruptcy proceedings, is not in the court's jurisdiction. Thus it has been held that the bankruptcy court has no jurisdiction of a plenary suit by a third person to cancel the satisfaction of a mortgage and declare a trust in mortgaged property of a bankrupt, which is not in the possession of a trustee, and in which his general creditors have no interest; <sup>12</sup> nor to compel specific performance of a contract of the purchaser at the trustee's sale of the bankrupt's land to convey a portion thereof to another, <sup>13</sup> nor of a suit to offset a part of a sum ordered distributed to another party, because of prior transactions, <sup>14</sup> nor as to the liability of parties on a check given under similar circumstances. <sup>15</sup>

#### § 538. Suits by the trustee in the district court.

A trustee may bring a suit at law or in equity arising in the settlement of a bankrupt's estate against an adverse claimant in the district court, if there is a sufficient jurisdictional amount involved and the requisite diversity of citizenship exists, or the case arises under the constitution, laws or treaties of the United States, if the bankrupt could have maintained the suit had bankruptcy not intervened.<sup>1</sup>

It is to be observed that the jurisdiction vested and limited in bankruptcy cases in the circuit courts is transferred to the district courts by the judicial code.<sup>2</sup> Any case which could

Hawarden Bank, 178 U. S. 524, 44 L. Ed. 1175, 4 Am. B. R. 163; Harris v. First Nat. Bank, 216 U. S. 382, 54 L. Ed. 528, 23 Am. B. R. 632.

<sup>12</sup> Brumby v. Jones (C. C. A.
 5th Cir.), 141 Fed. Rep. 320, 72 C.
 C. A. 466, 15 Am. B. R. 578.

Henrie v. Henderson (C. C. A.
 C. C. A. 145 Fed. Rep. 316, 76
 C. C. A. 196, 16 Am. B. R. 617.

<sup>14</sup> In re Girard Glazed Kid Co., 136 Fed. Rep. 511, 14 Am. B. R. 485. 15 In re Augusta Pottery Co., 163
Fed. Rep. 1011, 21 Am. B. R. 64.
B. A. 1898, Sec. 23a; Bush v. Elliott, 202 U. S. 477, 50 L. Ed. 1114, 15 Am. B. R. 656; Spencer v. Duplan Silk Co., 191 U. S. 526, 48 L. Ed. 287, 11 Am. B. R. 563; Réed v. American-German Nat. Bank, 155 Fed. Rep. 233, 19 Am. B. R. 140.

<sup>2</sup> Section 291 of the judicial code, act of March 3, 1911, 36 Stat. at L. 1087. See Secs. 70 and 71, ante.

have been brought in the circuit court may now be brought in the district court, if the amount involved exceeds three thousand dollars and diverse citizenship between the bankrupt and the adverse claimant exists, or a federal question is involved.<sup>3</sup>

The citizenship of the trustee is immaterial in controversies with adverse claimants.<sup>4</sup> If the suit arises under the constitution, laws or treaties of the United States the citizenship of the parties is immaterial.<sup>5</sup>

It has been held that a suit by or against a trustee to enforce an agreement or contract, made with him after bankruptcy proceedings are begun, may be brought in the district court where diversity of citizenship exists between the trustee and adverse party without regard to the citizenship of the bankrupt.<sup>6</sup> The reason is that such cases are not limited by section 23a of the bankrupt act but fall under the general jurisdiction of the district courts conferred by the code of 1911.

If the jurisdictional requisites do not exist the court has no jurisdiction.<sup>7</sup> A simple contract creditor can not maintain a suit in a district court to set aside a fraudulent conveyance under section 23 of the bankrupt act.<sup>8</sup>

If a trustee begins an action in the state court it may be removed to the district court, if the necessary jurisdictional

<sup>3</sup> Section 24 of the judicial code provides that "The district courts shall have original jurisdiction as follows: First, Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, or between citizens of the same state claiming lands under grants from different states; or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (a) arises under the constitution or laws of the United States, or treaties made, or which

shall be made, under their authority, or (b) is between citizens of different states, or (c) is between citizens of a state and foreign states, citizens, or subjects."

<sup>4</sup> Bush v. Elliott, 202 U. S. 477, 50 L. Ed. 1114, 15 Am. B. R. 656.

<sup>5</sup> Reed v. American-German Nat. Bank, 155 Fed. Rep. 233, 19 Am. B. R. 140.

<sup>6</sup> McEldowney v. Card, 191 Fed. Rep. —.

<sup>7</sup> Goodier v. Barnes, 94 Fed. Rep. 798, 2 Am. B. R. 328.

8 Viquesney v. Allen (C. C. A.
4th Cir.), 131 Fed. Rep. 21, 65 C.
C. A. 259, 12 Am. B. R. 402,

requisites exist.9 The removal places it in the district court as if it had been commenced there on the ground on which it was removed.

An adverse claimant may bring a suit against a trustee in the district court, when the jurisdictional requisites exist.<sup>10</sup> Section 23 of the act applies to controversies between the trustee, as such and adverse claimants without regard to which begins the suit.

## § 539. Limitations of actions by or against trustees.

The statute provides that "suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed." <sup>1</sup>

This limitation applies to suits at law and in equity, and to suits brought in a state or federal court. The limitation applies, although the suit is brought in the name of the trustee for the use of another person.

The time is to be reckoned from the final decree. The filing of a bill or petition, although it is necessary to afterwards amend it, prevents the running of the statute.<sup>5</sup> But inability to serve process on a defendant has never been deemed an excuse for not commencing an action within the prescribed period.<sup>6</sup>

In order to avail of the advantage of the limitation it must be pleaded in some form.<sup>7</sup> Where the bill or petition shows

- Spencer v. Duplan Silk Co., 191
  U. S. 526, 48 L. Ed. 285, 11 Am.
  B. R. 563, and Sec. 38 of the judicial code, act of March 3, 1911, 36 Stat. at L. 1087.
- <sup>10</sup> Chattanooga Nat. Bank v. Rome Iron Works, 99 Fed. Rep. 82, 3 Am. B. R. 582; Hatch v. Curtin, 146 Fed. Rep. 200, 16 Am. B. R. 625.
- <sup>2</sup> B. A. 1898, Sec. 11*d*; Sheldon v. Parker, 66 Neb. 610, 11 Am. B. R. 152; Billafsky v. Abraham, 183 Mass. 401, 67 N. E. 3181.

- <sup>2</sup> Bailey v. Glover, 21 Wall. 342, 22 L. Ed. 638.
- <sup>3</sup> Comegys v. McCord, 11 Ala. 932; Archer v. Duval, 1 Fla. 219; Friedlander v. Holloman, 9 B. R. 331; Peiper v. Harmer, 5 B. R. 252.
  - <sup>4</sup> Pike v. Lowell, 32 Me. 245.
- <sup>5</sup> Bank v. Sherman, 101 U. S. 405, 25 L. Ed. 866.
- <sup>6</sup> Amy v. Watertown (No. 2), 130 U. S. 320, 32 L. Ed. 953.
- <sup>7</sup> Gormley v. Bunyan, 138 U. S. 623, 630, 34 L. Ed. 1086; Lyon v.

that the cause of action is barred by the statute it may be raised by demurrer.<sup>8</sup> Otherwise it must be set up by plea or answer.

A court of bankruptcy may in its discretion reopen the estate of a bankrupt to permit the trustee to maintain an action to recover property.9

#### § 540. Plenary suits against adverse claimants.

To recover property from an adverse claimant for the estate of a bankrupt is not a proceeding in bankruptcy. It presents a controversy arising in bankruptcy.<sup>1</sup> The referee has no jurisdiction of such cases.<sup>2</sup>

The general rule is that the trustee must bring an independent suit at law or in equity to recover money or property in the possession of a person who claims a right, title or interest in it as against the trustee.<sup>3</sup> Summary proceedings on a motion and notice, or rule to show cause, can not be substituted for plenary suits in such cases.<sup>4</sup>

Bertram, 20 How. 149, 15 L. Ed. 847; Retzer v. Wood, 109 U. S. 187, 27 L. Ed. 900; Upton v. Mc-Laughlin, 105 U. S. 640, 26 L. Ed. 1197.

<sup>8</sup> Harris v. Collins, 13 Ala. 388.

\*In re Goldman (C. C. A. 2d Cir.), 129 Fed. Rep. 212, 63 C. C. A. 370, 11 Am. B. R. 707; In re Paine, 127 Fed. Rep. 246, 11 Am. B. R. 351.

<sup>1</sup> Delta Nat. Bank v. Easterbrook (C. C. A. 5th Cir.), 133 Fed. Rep. 521, 67 C. C. A. 236, 13 Am. B. R. 338; Pond v. New York Exchange Bank, 124 Fed. Rep. 992, 10 Am: B. R. 343; *In re* Walsh Bros. 163 Fed. Rep. 352, 21 Am. B. R. 14.

In re Hayden, 172 Fed. Rep. 623, 122 Am. B. R. 764; Knapp & Spenser v. Drew, 160 Fed. Rep. 413, 20 Am. B. R. 355; In re Over-

holzer (Ref.), 23 Am. B. R. 10, In re Walsh Bros., 163 Fed. Rep. 352, 21 Am. B. R. 14.

<sup>8</sup> Bardes v. Hawarden Bank, 178 U. S. 524, 44 L. Ed. 1175, 4 Am. B. R. 163; Louisville Trust Co. v. Comingor, 184 U. S. 18, 46 L. Ed. 413, 7 Am. B. R. 421, affirming Ex parte Comingor (C. C. A. 6th Cir.), 107 Fed. Rep. 898, 47 C. C. A. 51, 5 Am. B. R. 537; In re Rathman (C. C. A. 8th Cir.), 183 Fed. Rep. 913, 106 C. C. A. 253, 25 Am. B. R. 246.

As to the right to trial by jury, see Jones v. MacKenzie (C. C. A. 8th Cir.), 122 Fed. Rep. 390, 58 C. C. A. 96.

<sup>4</sup> First Nat. Bank v. Title & Trust Co., 198 U. S. 280, 49 L. Ed. 1051, 14 Am. B. R. 102; Jaquith v. Rowley, 188 U. S. 620, 47 L. Ed. 620, 9 Am. B. R. 525; Louisville

The form of pleading is immaterial where the court has jurisdiction to proceed by way of plenary suit and no seasonable objection is taken to the form of procedure, and where under the form of procedure adopted the rights of the respondent are substantially as in a plenary suit.<sup>5</sup>

A person who claims to own the property is clearly an adverse claimant. It is not necessary in order to be an adverse claimant that he should claim to be the absolute owner of the property in his possession. It is sufficient if money was deposited with him to indemnify him for a liability and that liability has not been determined and satisfied.<sup>6</sup> The holder of a substantial claim to a lien created by the bankrupt is an adverse claimant.<sup>7</sup>

Trust Co. v. Comingor, 184 U. S. 18, 46 L. Ed. 413, 7 Am. B. R. 421; In re Young (C. C. A. 8th Cir.), 111 Fed. Rep. 158, 49 C. C. A. 283, 7 Am. B. R. 14; In re Rathman (C. C. A. 8th Cir.), 183 Fed. Rep. 913, 106 C. C. A. 253, 25 Am. B. R. 246; In re Adams, 130 Fed. Rep. 788, 12 Am. B. R. 367; Parker v. Black, 143 Fed. Rep. 560, 16 Am. B. R. 202.

In re Steuer, 104 Fed. Rep. 976, 5 Am. B. R. 209; Milner v. Meek, 95 U. S. 252, 24 L. Ed. 444; Stickney v. Wilt, 23 Wall. 150, 23 L. Ed. 50; Knapp & Spencer Co. v. Drew (C. C. A. 8th Cir.), 160 Fed. Rep. 413, 87 C. C. A. 365, 20 Am. B. R. 355.

In re Kenney (C. C. A. 2d Cir.), 105 Fed. Rep. 897, 5 Am. B. R. 355, this rule was applied, but not directly decided.

In re Steuer, supra, an amendment was permitted to be made to a petition for an injunction and then sustained to recover a preference by Judge Lowell, who said:

"In order that proceedings to recover property may be validly commenced by petition in bankruptcy, the petition must contain a complete statement of the cause of action, and a sufficient prayer for relief. Upon such a petition process must be issued, and the parties must be given full opportunity to present evidence and arguments in their own behalf. In other words, though the formal requisites of a bill in equity may be wanting, yet the substantial requisites of equitable justice must be complied with as fully in a petition in bankruptcy as in a bill in equity."

<sup>6</sup> Jaquith v. Rowley, 188 U. S.
620, 47 L. Ed. 256, 9 Am. B. R.
525; In re Horgan (C. C. A. 1st Cir.), 158 Fed. Rep. 774, 86 C. C.
A. 130, 19 Am. B. R. 857.

<sup>7</sup> Frank v: Vollkommer, 205 U. S. 521, 51 L. Ed. 911, 17 Am. B. R. 806; *In re* McMahon (C. C. A. 6th Cir.), 147 Fed. Rep. 684, 77 C. C. A. 668, 17 Am. B. R. 530; Carling v. Seymour Lumber Co. (C. C. A. 5th Cir.), 113 Fed. Rep. 483, 51 C. C. A. 1, 8 Am. B. R. 29; Skilton v. Codington, 185 N. Y. 80.

It has been held that a plenary suit at law or in equity was necessary in the following cases: An action of replevin to recover specific property,8 or a suit to set aside fraudulent transfer of money or property and to recover the same for the estate,9 or to restrain a third party from dealing with property claimed to belong to the bankrupt's estate, 10 or to recover fees paid by an assignee to himself and his attorney for services rendered in a state court,11 or to recover a judgment which was collected by execution and the money paid over to the judgment creditor before the petition in bankruptcy was filed against the judgment debtor, 12 or a proceeding to foreclose a collateral security held by the bankrupt to secure a debt of a third person,18 or a bill by creditors to reach and subject to their claims exempt property of a bankrupt,14 or a suit to recover money deposited with a surety to indemnify him for his liability upon a bail bond where that liability has not been determined and satisfied,15 or a suit against the daughter of the bankrupt, who is doing business in her own name, to inquire into an alleged fraud between her and the bankrupt,18 or controversy over an order directed to a landlord to allow

8 Mitchell v. McClure, 178 U. S. 539, 44 L. Ed. 1182, 4 Am. B. R. 177; Cook v. Scovil, 53 Atl. Rep. 692.

<sup>9</sup> Bardes v. Hawarden Bank, 178
U. S. 524, 44 L. Ed. 1175, 4 Am. B.
R. 163; Hicks v. Knost, 178 U. S.
541, 44 L. Ed. 1183, 4 Am. B. R. 178;
In re Michie, 116 Fed. Rep. 749,
8 Am. B. R. 734.

<sup>10</sup> In re Ward, 104 Fed. Rep. 985,
 5 Am. B. R. 215.

11 Louisville Trust Co. v. Comingor, 184 U. S. 18, 46 L. Ed. 413, 7 Am. B. R. 421, affirming *Ex parte* Comingor (C. C. A. 6th Cir.), 107 Fed. Rep. 898, 47 C. C. A. 51, 5 Am. B. R. 537; *In re* Klein & Co., 116 Fed. Rep. 523, 8 Am. B. R. 559; *In re* Carver & Co., 113 Fed. Rep. 138, 7 Am. B. R. 539.

12 In re Blair, 102 Fed. Rep. 987,

4 Am. B. R. 220; In re Knickerbocker, 121 Fed. Rep. 1004, 10 Am. B. R. 381; In re Rudnick & Co., 160 Fed. Rep. 903, 20 Am. B. R. 33; In re Resnek, 167 Fed. Rep. 574, 21 Am. B. R. 740; In re Bailey, 144 Fed. Rep. 214, 16 Am. B. R. 289.

Consult observation of Mr. Justice Brewer in Clark v. Larremore, 188 U. S. 486, 490, 47 L. Ed. 555, 9 Am. B. R. 476.

<sup>13</sup> McKey v. Smith, 105 Fed. Rep. 899, 5 Am. B. R. 568.

Woodruff v. Cheeves (C. C.
 A. 5th Cir.), 105 Fed. Rep. 601, 44
 C. C. A. 631, 5 Am. B. R. 296.

<sup>15</sup> Jaquith v. Rowley, 188 U. S.
 620, 47 L. Ed. 526, 9 Am. B. R. 525.
 <sup>10</sup> In re Sarah Cohen, 98 Fed.
 Rep. 75, 3 Am. B. R. 421.

the removal of a cash register system,<sup>17</sup> or proceedings to recover security deposited to secure release of attachment on certain property,<sup>18</sup> or a suit to declare the mortgages, the decree of the state court, and the sale void, that the trustee recover of the respondent the value of the personal property which he purchased under the decree and that the trustee be permitted to redeem the real estate from the mortgage, and the foreclosure sale by paying the amount which the respondent paid for it at the sale less the amount which the mortgagor realized from the sale of a portion of the mortgaged property before the foreclosure sale of the balance to the respondent.<sup>19</sup>

It has been held, on the other hand, that the following are not adverse claimants: An assignee for the benefit of creditors, 19\* a person who has mere possession of the property without claim of title, 20 or a mortgagee who enters into possession under a default clause in the mortgage before the expiration of the time named in that clause. 21

A different rule prevails when the property in controversy is in the custody of the court and not in the possession of the adverse claimant.<sup>22</sup>

A court of bankruptcy has full power by summary proceedings to determine all controversies relating to the title of property, which is in the custody of the court or an officer thereof,<sup>23</sup> or to compel a person to deliver to the trustee prop-

<sup>17</sup> In re Darlington Co., 163 Fed. Rep. 389, 20 Am. B. R. 805.

18 In re Squire, 165 Fed. Rep.
 515, 21 Am. B. R. 346.

19 Bryan v. Bernheimer, 181 U. S.
188, 45 L. Ed. 814, 5 Am. B. R.
623; Leidigh Carriage Co. v. Stengel (C. C. A. 6th Cir.), 95 Fed.
Rep. 637, 37 C. C. A. 210, 2 Am.
B. R. 383; In re Stokes, 160 Fed.
Rep. 312, 6 Am. B. R. 262.

19\* In re Rathman (C. C. A. 8th
 Cir.), 183 Fed. Rep. 913, 106 C. C.
 A. 253, 25 Am. B. R. 246.

<sup>20</sup> In re Moore, 104 Fed. Rep. 869, 5 Am. B. R. 151. Jed. Rep. 904, 9 Am. B. R. 427.

22 Sec. 31, et seq., ante.

<sup>28</sup> See Sec. 32, ante; Whitney v. Wenman, 198 U. S. 539, 49 L. Ed. 1157, 14 Am. B. R. 45; White v. Schloerb, 178 U. S. 542, 44 L. Ed. 1183, 4 Am. B. R. 178; In re Rochford (C. C. A. 8th Cir.), 124 Fed. Rep. 182, 59 C. C. A. 388, 10 Am. B. R. 608; Keegan v. King, 96 Fed. Rep. 758, 3 Am. B. R. 79; In re Whitener (C. C. A. 5th Cir.), 105 Fed. Rep. 180, 44 C. C. A. 434, 5 Am. B. R. 198; In re Kellogg, 113 Fed. Rep. 120, 7 Am. B. R. 623

erty, claimed as part of the bankrupt's estate, in his possession to which he has no claim of title as against the trustee, such as a naked bailee,<sup>24</sup> agent,<sup>25</sup> or assignee for the benefit of creditors.<sup>26</sup> The court may inquire whether the adverse claim existed at the time of the filing of the petition and whether it is a bona fide claim.<sup>27</sup>

#### § 541. Form of action at law or in equity.

Suits by trustees to recover property for the estate may be actions at law in attachment, trover, assumpsit, etc., or suits in equity as a bill to set aside a fraudulent conveyance, etc.<sup>1</sup>

(affirmed, C. C. A. 2d. Cir.), 121 Fed. Rep. 333, 57 C. C. A. 547, 10 Am. B. R. 7; In re Schermerhorn (C. C. A. 8th Cir.), 145 Fed. Rep. 341, 76 C. C. A. 215, 16 Am. B. R. 508; In re McMahon (C. C. A. 6th Cir.), 147 Fed. Rep. 684, 77 C. C. A. 668, 17 Am. B. R. 531; In re Dana (C. C. A. 8th Cir.), 21 Am. B. R. 683, 167 Fed. Rep. 529, 93 C. C. A. 238; Mound Mines Company v. Hawthorn (C. C. A. 8th Cir.), 23 Am. B. R. 242, 173 Fed. Rep. 882, 97 C. C. A. 394; In re Jackson Brick & Tile Co., 189 Fed. Rep. 636.

<sup>24</sup> Mueller v. Nugent, 184 U. S. 1,
46 L. E. 405, 7 Am. B. R. 224,
5 Am. B. R. 176; In re Moore, 104
Fed. Rep. 869, 5 Am. B. R. 151;
In re Edelman, 154 Fed. Rep. 160,
19 Am. B. R. 45.

In re Michael Kane, 125 Fed. Rep. 984, 10 Am. B. R. 478, it was held that where property turned into cash a few days before the petition in involuntary bankruptcy is filed, a trustee alleges that the proceeds turned over to his wife and disbursed for personal expenses, the said proceeds must be held in actual possession or under his control and for disobedience

to turn them over to the trustee he may be adjudged in contempt.

In re Davis, 119 Fed. Rep. 950, 9 Am. B. R. 670, it was held proper for referee to order summary return of funds placed by purchaser of bankrupt's assets in a bank, there being at that time no claim against the same by the bank.

<sup>25</sup> In re Stokes, 105 Fed. Rep. 312, 6 Am. B. R. 262; Leidigh Carriage Co. v. Stengel (C. C. A. 6th Cir.), 95 Fed. Rep. 637, 37 C. C. A. 210, 2 Am. B. R. 383; Mueller v. Nugent, 184 U. S. 1, 46 L. Ed. 405, 5 Am. B. R. 176; Bryan v. Bernheimer, 181 U. S. 188, 45 L. Ed. 814, 5 Am. B. R. 523.

Mueller v. Nugent, 184 U. S.
1, 46 L. Ed. 405, 7 Am. B. R. 224;
In re Friedman, 153 Fed. Rep. 939,
18 Am. B. R. 712; In re Holbrook
Shoe & Leather Co., 165 Fed. Rep. 973, 21 Am. B. R. 511.

<sup>1</sup> Westall v. Avery (C. C. A. 4th Cir.), 171 Fed. Rep. 626, 96 C. C. A. 428, 23 Am. B. R. 673; Wall v. Cox (C. C. A. 4th Cir.), 101 Fed. Rep. 403, 41 C. C. A. 408, 4 Am. B. R. 659; Pond v. New York Exchange Bank, 124 Fed. Rep. 992, 10 Am. B. R. 343; Parker v. Black, 143 Fed. Rep. 560, 16 Am. B. R.

What kind of a suit will lie to recover property for the estate of a bankrupt depends upon the law governing the practice in the particular court in which the suit is brought.<sup>2</sup>

Whatever kind of action is adopted the defendant must be brought in by service of summons, unless he voluntarily appears and pleads. In case the property is within the jurisdiction of the federal court and the defendant is a nonresident of the district, he may be brought in by an order and service by publication.<sup>3</sup>

If the suit is brought in a federal court the pleading and practice is governed by the rules of that court.<sup>4</sup> A suit in equity can not be maintained where a plain, adequate and complete remedy may be had at law.<sup>5</sup> A suit in equity will lie in the federal court to set aside deeds and contracts as fraudulent or preferential.<sup>6</sup>

The trustee may sue in trover for a conversion of goods occurring before or after bankruptcy, or in assumpsit for the value of a preferential or fraudulent transfer of goods by the bankrupt.

202; Burns v. O'Gormân Co., 150 Fed. Rep. 226, 17 Am. B. R. 815; Wallace v. Camp, 200 Pa. St. 220, 49 A. 942, 14 Pa. Super. Ct. 79; Lyon v. Clark, 129 Mich. 381.

Westall v. Avery (C. C. A. 4th
Cir.), 171 Fed. Rep. 626, 96 C. C.
A. 428, 23 Am. B. R. 673; Pond
v. New York Exchange Bank, 124
Fed. Rep. 992, 10 Am. B. R. 343.

<sup>3</sup> R. S. Sec. 738, as amended by the act of March 3, 1875, Sec...8, 18 Stat. at L. 470, and preserved by act of March 3, 1888, Sec. 6, 25 Stat. at L. 433; Horskins v. Sanderson, 132 Fed. Rep. 415, 13 Am. B. R. 101. See Loveland's Forms of Fed. Prac. Nos. 63 to 69.

<sup>4</sup> Westall v. Avery (C. C. A. 4th Cir.), 171 Fed. Rep. 626, 96 C. C. A. 428, 23 Am. B. R. 673; Warmath v. O'Daniel (C. C. A. 6th Cir.), 159 Fed. Rep. 87, 86 C. C. A. 277, 20 Am. B. R. 101. <sup>5</sup> Warmath v. O'Daniel (C. C. A. 6th Cir.), 159 Fed. Rep. 87, 86 C. C. A. 277, 20 Am. B. R. 101. As to waiving right to object by pleading, see Mitchell v. Mitchell, 147 Fed. Rep. 280, 17 Am. B. R. 382.

<sup>6</sup> Wall v. Cox (C. C. A. 4th Cir.), 101 Fed. Rep. 403, 41 C. C. A. 408, 4 Am. B. R. 659; Westall v. Avery (C. C. A. 4th Cir.). 171 Fed. Rep. 626, 96 C. C. A. 428, 23 Am. B. R. 673; Horner-Gaylord Co. v. Miller & Bennett, 147 Fed. Rep. 295, 17 Am. B. R. 257; Pond v. New York Exchange Bank, 124 Fed. Rep. 992, 10 Am. B. R. 343; Thomas v. Sugarman, 218 U. S. 129; Parker v. Black, 151 Fed. Rep. 18, 18 Am. B. R. 15.

Burns v. O'Gorman Co., 150
 Fed. Rep. 226, 17 Am. B. R. 815.
 Reber v. Ellis Bros., 185 Fed.

If the suit is brought in the state court it must be of the character required by the state practice. In some states it has been held that an action for assumpsit will not lie to avoid transfers, but that the action should be one of trover. A petition in the state court for an order annulling an attachment may be proper. The trustee may recover in an action of trespass against the attaching creditor, the officer who made the sale and the purchaser who had heard rumors of the bankruptcy, where the sale under the attachment was held after the bankruptcy of the defendant. 11

No previous demand is required in suits of this character. The commencement is itself a demand.<sup>12</sup>

It is not necessary for a trustee to obtain a judgment and have execution returned *nulla bona*, before he can resort to a court of equity to recover a preference or set aside a fraudulent conveyance.<sup>13</sup> The supreme court has said "as to such preferences and conveyances he has all the right of a judgment creditor as well as the power specifically conferred by the bankruptcy act." <sup>14</sup>

Rep. 313, 25 Am. B. R. 567; In re Reynolds, 133 Fed. Rep. 584, 13 Am. B. R. 245.

<sup>9</sup> Lyon v. Clark, 129 Mich. 381; Weeks v. Fowler, (N. H.), 53 Atl. Rep. 543.

But see *In re* Reynolds, 133 Fed. Rep. 584, 13 Am. B. R. 245; Reber v. Ellis Bros., 185 Fed. Rep. 313. <sup>10</sup> Hardt v. Schuylkill Plush & Silk Co., 69 N. Y. App. Div. 90, 74 N. Y. Supp. 549.

<sup>11</sup> Wallace v. Camp, 200 Pa. St. 220, 49 A. 942, 14 Pa. Super. Ct. 79

12 Kaufman v. Tredway, 195 U. S. 271, 49 L. Ed. 190, 12 Am. B. R. 694; Eau Claire Nat. Bank v. Jackman, 204 U. S. 522, 535, 17 Am. B. R. 675; Wright v. Skinner, 136 Fed. Rep. 694, 14 Am. B. P. 500; Johnston v. Forsyth Mercantile Co., 127 Fed. Rep. 845, 11 Am. B. R. 669; Capital Nat. Bank v.

Wilkerson, 36 Ind. App. 407, 75 N. E. 837; Goldberger v. Harlan, 33 Ind. App. 465, 67 N. E. 707; Barbour v. Priest, 103 U. S. 293, 26 L. Ed. 478.

13 Mueller v. Bruss, 112 Wis. 405, 8 Am. B. R. 442; Andrews v. Mather, 134 Ala. 358, 9 Am. B. R. 296; Beasley v. Coggins, 48 Fla. 215, 12 Am. B. R. 355, 37 So. Rep. 213; Sheldon v. Parker, 66 Neb. 610, 613, 11 Am. B. R. 152, 169; Hood v. Blair State Bank (Neb.), 91 N. W. R. 701; Mitchell v. Mitchell, 147 Fed. Rep. 280, 17 Am. B. R. 382; Off v. Hakes (C. C. A. 7th Cir.), 142 Fed. Rep. 364, 73 C. C. A. 464, 15 Am. B. R. 696; Texas Brewing Co. v. Mallette, 28 Tex. Civ. App. 461, 67 S. W. 441.

<sup>14</sup> Mr. Justice Waite, in Dudley v. Easton, 104 U. S. 99, 103, 26 L. Ed. 668. Where resort is had to a suit in equity in a court of bankruptcy, that court has the powers usually vested in courts of equity, to enforce equities between the parties.<sup>15</sup> It may grant an injunction to prevent the defendant from disposing of the property sought to be recovered,<sup>15</sup> or a writ of sequestration to prevent its removal from the district, or it may appoint a receiver to take custody of the property.<sup>16</sup>

#### § 542. Parties.

The trustee, as representing the bankrupt's creditors, is the proper party plaintiff in suits to recover property for the estate.<sup>1</sup>

The trustee is vested with the title to the property of the bankrupt, not exempt, including that which has been transferred in fraud of creditors and as a preference.<sup>2</sup> The right to bring suits to collect and recover property is expressly

See also the amendment of 1910, Sec. 8, discussed fully under Sec. 372, ante.

15 Allen v. McMannes, 156 Fed.
Rep. 615, 19 Am. B. R. 276; Ommen v. Talcott, 175 Fed. Rep. 261,
23 Am. B. R. 572; Blake v. Nesbet,
144 Fed. Rep. 279, 16 Am. B. R.
269; Lawrence v. Lowric, 133 Fed.
Rep. 995; 13 Am. B. R. 297; Horner-Gaylord Co. v. Miller & Bennett, 147 Fed. Rep. 295, 17 Am.
B. R. 257; Pyle v. Texas Transport & Term. Co., 185 Fed. Rep.
308, 25 Am. B. R. 829.

Equity will interfere to prevent consummation of a conspiracy to give a preference though the debtor became bankrupt. Johnson v. Whitley Grocery Co., 112 Ga. 449, 37, S. E. 766.

<sup>16</sup> Horskins v. Sanderson, 132
 Fed. Rep. 415, 13 Am. B. R. 101.

<sup>1</sup> As to authority to sue, see Sec. 535, ante; Frost v. Latham & Co.,

181 Fed. Rep. 866, 25 Am. B. R. 313; Trimble v. Woodhead, 102 U. S. 647, 26 L. Ed. 290; Glenny v. Langdon, 98 U. S. 20, 25 L. Ed. 43; In re Meyers, No. 1518 Fed. Cas., 2 Ben. 424; Thompson v. First National Bank, 84 Miss. 54; In re Gray, 47 N. Y. Supr. Ct. App. Div. 554, 3 Am. B. R. 647; Allen & Co. v. Montgomery, 48 Miss. 101; Barker v. Franklin, 75 N. Y. Supp. 305, 8 Am. B. R. 468; Falco v. Kaupisch Creamery Co., 42 Oreg. 422, 70 Pac. R. 286; Pfeiffer v. Roe, 108 N. Y. App. Div. 54, 95 N. Y. Suppl. 1014; Pease v. McQuillin, 180 Mass. 135.

In Newland v. Zodikow, 11 Am. B. R. 770, it was held that where it clearly appears that plaintiff is suing as trustee, the omission in the petition and summons of the word "as" before "trustee" is not fatal to the action as a representative one.

<sup>2</sup> See title of trustee, Sec. 371, ante.

given to the trustee by the act.<sup>3</sup> He can not assign to another his right to sue.<sup>4</sup>

A receiver <sup>5</sup> or a creditor can not maintain a suit to recover property for the estate.<sup>6</sup>

A trustee may maintain a suit against a trustee in bankruptcy of a former trustee of the estate to recover a preference —money paid to himself while he was trustee.<sup>7</sup>

The defendant in a suit to recover property by a trustee should be the creditor, who has received the property by way of preference or fraudulent conveyance, or any person receiving it from him with knowledge of the fraud.<sup>8</sup> Where a corporation is formed by a firm who took a fraudulent conveyance the corporation should be sued and is liable.<sup>9</sup>

A fraudulent grantee or transferee after he has conveyed or transferred all the property to another fraudulent grantee or transferee is not a necessary party, although it is not improper to join him, but his grantee or transferee is a necessary party. Recovery "from such person" under section 60b means from the preferred creditor and not from his vendee in a suit either for the property itself or its value. 11

<sup>8</sup> B. A. 1898, Secs. 60b, 67e and 70e, as amended by the act of Feb. 3, 1903, 32 Stat. at L. 797, and the act of June 25, 1910, 36 Stat. at L. 838.

<sup>4</sup> Belding-Hall Mfg. Co. v. Mercer & Ferdon Lumber Co. (C. C. A. 6th Cir.), 175 Fed. Rep. 335, 99 C. C. A. 123, 23 Am. B. R. 595; Lewis v. First Nat. Bank, 46 Orc. 182, 78 Pac. 990; Morgan v. Abbott, 148 Mass. 507; Allen v. Montgomery, 48 Miss. 101.

But see Bryan v. Madden, 109 N. Y. App. Div. 876, 96 N. Y. Supp. 465.

<sup>5</sup> See Sec. 217, ante, and cases there cited.

<sup>6</sup> See Sec. 371, ante; Moyer v. Dewey, 103 U. S. 301, 26 L. Ed. 394; Glenny v. Langdon, 98 U. S. 20, 25 I.. Ed. 43; Leseure v.

Weaver, 108 III. App. 616; King v. Dietz, 12 Pa. St. 156; Lane v. Nickerson, 99 III. 284; Moore-Schafer Shoe Mfg. Co. v. Billings, 46 Oreg. 401, 80 P. 422, not by creditor who has no lien.

<sup>7</sup> Block v. Rice, 167 Fed. Rep. 693, 21 Am. B. R. 691,

8 Hackney v. First Nat. Bank,
68 Neb. 594; Bush v. Export Storage Co., 136 Fed. Rep. 918, 14 Am.
B. R. 138; Walbrun v. Babbitt, 16
Wall. 577, 21 L. Ed. 489. See
Bryan v. Bernheimer, 181 U. S.
188, 197, 45 L. Ed. 814, 5 Am. B. R.
523.

<sup>9</sup> Holloway & McRaney v. Brame, 83 Miss. 335, 36 S. 1.

 Skillen v. Endelman, 39 Misc.
 (N. Y.) 261, 79 N. Y. Suppl. 413.
 Hackney v. First National Bank, 68 Neb. 588, 98 N. W. 412. A township may be a defendant.<sup>11\*</sup> A trustee can not sue secretary of the treasury on judgment rendered against United States in equity in absence of allegations showing jurisdiction in equity.<sup>11\*\*</sup>

The bankrupt is not a necessary party to a suit to set aside a fraudulent conveyance or recover property as a preference.<sup>12</sup>

It has been held that an assignee for the benefit of creditors who has proceeded under the state law to distribute the property of the bankrupt can not be held personally liable for the assets which came into his hands and were distributed. But the trustee "must seek his remedy against those who have received payments from the defendant in contravention of the bankrupt act." <sup>18</sup> Where the property has been transferred by such creditor to a bona fide purchaser for a consideration, the trustee can not recover the specific property. His remedy is a suit for the value only from the creditor or any person holding it with notice of the fraud. <sup>14</sup>

A trustee can not reach third parties to whom money may have been paid or property transferred in good faith for a valuable consideration by such creditor. But where property is fraudulently transferred by a debtor his trustee may recover it in the hands of one having notice of the fraud.

# § 543. Distinction between suits for fraudulent conveyance or for preference.

A suit to set aside a preference and recover the property for the estate under section 60b is different from a suit to

11\* Painter v. Napoleon Township,156 Fed. Rep. 289, 19 Am. B. R.412.

11\*\* Bryan v. Curtis (C. C. A. Dist. of C.), 19 Am. B. R. 894.

12 Cox v. Wall, 99 Fed. Rep. 546,
3 Am. B. R. 664; Buffington v. Harvey, 95 U. S. 99, 24 L. Ed. 381.
But see Carter v. Hobbs, 92 Fed.
Rep. 594, 1 Am. B. R. 215.

<sup>13</sup> Cragin v. Thompson, No. 3320

Fed. Cas., 2 Dill. 513, per Judge Dillon; In re Cohn, No. 2966 Fed. Cas., 6 N. B. R. 370; Jones v. Kinney, No. 7473 Fed. Cas., 5 Ben. 259; Anshutz v. Hoerr, 1 Fed. Rep. 594-5.

<sup>14</sup> B. A. 1898, Secs. 67f and 67e; Hackney v. First National Bank, 68 Neb. 594; Bush v. Export Storage Co., 136 Fed. Rep. 918, 14 Am. B. R. 138. set aside a fraudulent conveyance under section 67e and section 70e.

In the first case there need be no actual fraud involved in the transaction. It is fraudulent because the statute makes it so. A suit under the last two sections is founded upon actual fraud. A bill, which stated one transaction and alleged it to be either a preference or a fraudulent conveyance and sought to have it set aside, was held not to state two inconsistent causes of action for equitable relief.<sup>2</sup>

#### § 544. Burden of proof.

In a suit to set aside a preference or fraudulent conveyance the burden is upon the trustee to establish that the preference or transfer is fraudulent under the bankruptcy act.<sup>3</sup>

The title of a purchaser from a preferred creditor is not voidable when he took in good faith and without notice and for a valuable consideration. Coolidge v. Ayers, 76 Vt. 405, 57 A. 970.

<sup>1</sup> In Coder v. Arts, 213 U. S. 223, 241, 53 L. Ed. 772, 22 Am. B. R. 1, 14, the supreme court said: "In construing the bankruptcy act this distinction must be kept constantly in mind. As was said in Githens v. Shiffler, 112 Fed. Rep. 505, 7 Am. B. R. 453, 'An attempt to prefer is not to be confounded with an attempt to defraud, nor a preferential transfer with a fraudulent one.' In re. Maher, 144 Fed. 503, 505, 16 Am. B. R. 340, it was well said by the district court of Massachusetts.

"In a preferential transfer the fraud is constructive or technical, consisting in the infraction of that rule of equal distribution among all creditors which it is the policy of the law to enforce when all can not be fully paid. In a fraudulent transfer the fraud is actual—the bankrupt has secured an advantage

for himself out of what in law should belong to his creditors and not to him."

<sup>2</sup> Wright v. Skinner, 136 Fed. Rep. 694, 14 Am. B. R. 500.

<sup>3</sup> Kimmerle v. Farr (C. C. A. 6th Cir.), 189 Fed. Rep. 295, 109 C. C. A. —, 27 Am. B. R. —; Barbour v. Priest, 103 U. S. 293, 26 L. Ed. 478; Keith v. Gettysburg Nat. Bank, 23 Pa. Superior Ct. Rep. 14, 10 Ani. B. R. 762; Capital Nat. Bank v. Wilkerson 36 Ind. App. 407, 72 N. E. Rep. 247; In re Rome Planing Mills, 96 Fed. Rep. 812, 3 Am. B. R. 123, 128; In re Gilbert, 112 Fed. Rep. 951, 8 Am. B. R. 101; Kimball v. Dresser, 98 Me. 519: Edwards v. Milling Co., 108 Mo. App. 275; Halbert v. Pranke, 91 Minn. 204; Greene v. Montana Brewing Co., 28 Mont. 380, 72 P. 751; Eason v. Garrison & Kelly, 36 Tex. Civ. App. 574, 82 S. W. 800; In re Kayser (C. C. A. 3d Cir.), 177 Fed. Rep. 383, 100 C. C. A. 615, 24 Am. B. R. 174; Reber v. Shulman, 179 Fed. Rep. 574, 24 Am. B. R. 782,

Under Sec. 67f the burden is

The burden is upon the defendant to establish the affirmative defense of bona hae purchaser for value, and on the transferee under a forged power of attorney to show an equitable interest in certain stock to which he claimed to be subrogated.<sup>5</sup> The burden is on him who would show that the adjudication discharged a lien.<sup>6</sup>

## § 545 Mecessary allegations in action to recover preference.

In a suit to recover a preference the trustee should allege and prove the filing of the petition in bankruptcy, the adjudication and his appointment and qualification as trustee of the estate of the bankrupt.

He should also allege and prove all the statutory elements constituting a preference, and that the person receiving it, or his agent, had a reasonable cause to believe that it was in effect a preference. 64 That is to say, he must aver, hvst, the insolvency of the debtor at the time the judgment was entered or the transfer made in favor of the creditor; 66 second, that

<sup>6</sup> Causey Lumber Co. v. Connor,
 <sup>6</sup> Ga. App. 444, 65 S. E. 194.
 <sup>64</sup> B. A. 1898, Secs. 60a and 60b.
 See Sec. 494, et seq., where these

elements are considered.

Although the land claimed to be the subject of a preferential transfer was insufficiently described in the petition, still every presumption must be indulged in favor of the correctness of the judgment made the petition may have been cured by the evidence. First State Bank v. Fir

Am. B. R. 330.

86 See Sec. 495, ante; Tumlin v.

Bryan (C. C. A. 5th Cir.), 165

Fed. Rep. 166, 91 C. C. A. 200, 21

36 Misc. Rep. (N. Y.) 298, 7

Am. B. R. 319; Martin v. Bigelow, 36 Misc. Rep. (N. Y.) 298, 7

Friat's Point (Sup. Ct. Miss.), Friat's Point (Sup. Ct. Miss.), 55 Am. B. R. 56; Deland v. Miller

on the trustee to show that the bankrupt was insolvent at the time the lien within four months was created. Jackson v. Valley Tie & Lumber Co., 108 Va. 714, 62 S. E. 545, 7 Am. B. R. 608. Burden on trustee to prove all the elements of a preference. Reber v. Schulman & Bro., 179 Fed. 574, 24 Am. B. R. 782; C. A. 4th Cir.), 152 Fed. Rep. 283, 82 C. C. A. 114 18 Am. B. R. 509; Baden v. Bettenshaw, 68 Kan. 32, 74 P. 639.

<sup>4</sup> Lawrence v. Lowrie, 133 Fed. Rep. 995, 13 Am. B. R. 297; Mc-Multy v. Wiesen, 130 Fed. Rep. Wall & Huske, 132 N. C. 730, 44 S. Wall & Huske, 132 N. C. 730, 44 S.

E. 635.

<sup>a</sup> Unity Banking & Saving Co. v.
Boyden (C. C. A. 6th Cir.), 159
Fed. Rep. 916, 87 C. C. A. 96, 20
Am. B. R. 264, affirmed, 217 U. S.

127.

this was done within four months of bankruptcy; <sup>67</sup> third, that the effect of this was that the defendant obtained a greater percentage of his debt than any other creditor of the bankrupt of the same class; <sup>68</sup> and fourth, that the defendant or his agent <sup>69</sup> had reasonable grounds to believe that the effect of such transfer of property (or judgment) was to give a preference to the defendant within the meaning of the acts of Congress relating to bankruptcy. <sup>70</sup>

If the trustee fails to allege any one of these elements, his bill, declaration or petition is bad on demurrer.<sup>71</sup> If he fails to prove all of these elements, judgment should be entered for the defendant.<sup>71\*</sup> It is not enough to prove that the transfer in question is the very act of bankruptcy for which an adjudication has already been made.<sup>72</sup>

& Chaney Bank (Ia.), 93 N. W. Rep. 304; Severin v. Robinson, 27 Ind. App. 55, 60 N. E. Rep. 966.

67 See Sec. 498, et seq., ante.

<sup>68</sup> See Sec. 512, ante; Painter v. Napoleon Township, 156 Fed. Rep. 289, 19 Am. B. R. 412; Kimball v. Dresser, 98 Me. 519; Baden v. Bertenshaw, 68 Kan. 32.

<sup>69</sup> Plummer v. Myers, 137 Fed. Rep. 660, 14 Am. B. R. 805. See Sec. 509, ante.

70 See Sec. 505, ante; Turner v. Fisher, 133 Fed. Rep. 594, 13 Am. B. R. 243; Crooks v. People's Nat. Bank, 3 Am. B. R. 238; In re Blair, 102 Fed. Rep. 987, 4 Am. B. R. 220; Peck v. Connell (Supr. Ct. of Pa.), 8 Am. B. R. 500; Levor v. Seiter (Sup. Ct. N. Y. App. Div.), 8 Am. B. R. 469; Brown v. Guichard (Sup. Ct. N. Y.), 7 Am. B. R. 515; Taft v. Fourth Nat. Bank (Sup. Ct. Cir.), 2 N. B. N. 1145, 8 Ohio N. P. Rep. 59.

71 Peck v. Connell (Super. Ct. Pa.), 8 Am. B. R. 500; Hicks v. Langhorst (Hamilton Co. Common Pleas, Ohio), 6 Am. B. R. 178;

Martin v. Bigelow, 36 Misc. Rep. (N. Y.) 298, 7 Am. B. R. 218.

71\* In Kimmerle v. Farr (C. C. A. 6th Cir.), 189 Fed. Rep. 295, 109 C. C. A. —, 27 Am. B. R. —, the court said: "Under Section 60a and b of the bankruptcy act, as it stood after the amendment of February 5, 1903, and prior to the amendment of June 25, 1910, the burden of proof is on a trustee in bankruptcy, seeking to avoid as a preference a transfer of property made by a bankrupt, to prove by sufficient evidence that the bankrupt (1) while insolvent (2) within four months of the bankruptcy (3) made the transfer in question; (4) that the creditor receiving the transfer will be thereby enabled to obtain a greater percentage of his debt than other creditors of the same class; and (5) that the creditor receiving the transfer had reasonable cause to believe that it was thereby intended to give a preference."

<sup>72</sup> Traders' Insurance Co. v. Mann, 118 Ga. 381, 45 S. E. 426.

#### § 546. Evidence of insolvency.

The books of the bankrupt, the schedules and appraisement are competent evidence on the question of insolvency within four months of the date of the filing of the petition, but are not conclusive.<sup>73</sup>

Where the quantity and value of the bankrupt's assets were not materially diminished from the time of the transfer until the commencement of the proceedings in bankruptcy, the court and jury may find that the debtor was insolvent when he made the transfer.<sup>74</sup>

The mere fact that a debtor is adjudged a bankrupt raises no presumption of insolvency prior to the filing of the petition, 75 unless the question of insolvency is adjudged in determining an act of bankruptcy in an involuntary proceeding. In that case the effect of insolvency at the date the act was committed may be deemed as established by the adjudication. The question of insolvency is one of fact to be submitted to the jury under proper instructions when the case is tried to a jury. The question of insolvency is one of fact to be submitted to the jury under proper instructions when the case is tried to a jury.

## § 547. Reasonable cause to believe a preference.

Whether a creditor has reasonable cause to believe that a preference is given is determined by the conduct of the parties and the nature of the transaction.<sup>78</sup>

<sup>78</sup> See Secs. 141 and 142, ante;
In re Docker-Fisher Co., 123 Fed.
Rep. 190, 10 Am. B. R. 584; In re
Mandel, 127 Fed. Rep. 863, 10 Am.
B. R. 774; Bank of N. Y., v.
Southern Nat. Bank, 170 N. Y. 1;
Hackney v. Hargreaves Bros., 68
Neb. 625, 13 Am. B. R. 164, overruling 10 Am. B. R. 213.

In Cullinane v. State Bank, 123 Ia. 340, 12 Am. B. R. 776, 779, it was held that in an action to recover voidable preference trustee can not introduce number and amount of claim filed and allowed by referee.

74 Clarion Bank v. Jones, 21 Wall.
 325, 22 L. Ed. 542.

<sup>75</sup> In re Rome Planing Mills, 96 Fed. Rep. 812, 3 Am. B. R. 123; Kimball v. Dresser, 98 Me. 519; Edwards v. Milling Co., 108 Mo. App. 275; In re Chappell, 113 Fed. Rep. 545, 7 Am. B. R. 608.

76 DeGraff v. Lang, 87 N. Y.
 Supp. 78, 92 N. Y. Supr. Ct. (App. Div.) 564; Whitwell v. Wright, 120
 N. Y. Suppl. 1065, 136 N. Y. App. Div. 246.

<sup>77</sup> Kaufman v. Treadway, 195 U. S. 271, 49 L. Ed. 190, 12 Am. B. R. 682; Upson v. Mt. Morris Bank (N. Y. Supp. Ct. App. Div. 3, 14 Am. B. R. 6.

<sup>78</sup> Coder v. Arts, 213 U. S. 223,53 L. Ed. 772, 22 Am. B. R. 1;

Whether or not the facts and circumstances in the possession of the creditor at the time the alleged preference was made, were sufficient to cause an ordinarily prudent business man to conclude a preference was intended is a question for the jury and not for the court in a jury trial.<sup>80</sup> The statute of 1910, section 11, changed the rule to a question of reasonable cause to believe that the enforcement of the judgment or transfer "would effect a preference."

Whether the defendant is a purchaser in good faith for a present fair consideration is a question for the jury under instructions.<sup>81</sup>

# § 548. Necessary allegations in action to set aside fraudulent conveyance.

In a suit to set aside a fraudulent conveyance or transfer under paragraph one of section 67e, the trustee should allege and prove, first, the filing of the petition in bankruptcy, the adjudication of the debtor, and his appointment and qualification as trustee of the estate of the bankrupt; second, that the transfer was made within four months prior to the filing of the petition in bankruptcy; and, third, that it was made with the intent and purpose on the debtor's part to hinder, delay or defraud his creditors.

The phrase "to hinder, delay, or defraud his creditors" as used in the bankruptcy act has been construed to have the same

In re Leech (C C. A. 6th Cir.), 171 Fed. 672, 96 C. C. A. 424; Sparks v. March, 177 Fed. Rep. 739, 24 Am. B. R. 280; Hackney v. Hargreaves Bros., 68 Neb. 625, 13 Am. B. R. 164, overruling 10 Am. B. R. 213; Sebring v. Wellington, N. Y. Supr. Ct. (App. Div.), 671, 6 Am. B. R. 671.

In Wilson v. Nelson, 183 U. S. 191, 46 L. Ed. 147, the supreme court says "the act of 1898 makes the result obtained by the creditor, and not the specific intent of the debtor, the essential fact." The parties should be permitted to testify to their intention on a ques-

tion of preference. Hackney v. Raymond Bros. Clarke Co., 68 Neb. 624, 94 N. W. 822.

80 Kaufman v. Treadway, 195 U. S. 271; 49 L. Ed. 190, 12 Am. B. R. 682; Wetstein v. Franciscus (C. C. A. 2d Cir.), 133 Fed. Rep. 900, 67 C. C. A. 62, 13 Am. B. R. 326; Sundheim v. Ridge Ave. Bank, 138 Fed. Rep. 951, 15 Am. B. R. 132; Evans v. Nat. Broadway Bank, 88 N. Y. Supr. Ct. (App. Div.) 549, 85 N. Y. Sup. 101.

81 Montgomery v. McNicholas,138 Fed. Rep. 956, 15 Am. B. R.93.

meaning as the same words used in statutes against conveyances fraudulent as against creditors from the time of the statute of 13 Elizabeth.<sup>82</sup> This allegation should state facts sufficient to make a case under the statute of frauds.<sup>83</sup>

Insolvency is not a statutory element necessary to recovery in this class of cases. It is not necessary to aver insolvency except as it may be involved in establishing a transfer to hinder, delay or defraud creditors. In case the defendant is an assignee of the fraudulent grantee, the trustee should show that he had knowledge of the fraud. The defendant may plead as a defense to the action that he is a purchaser in good faith for a fair present consideration and the burden is upon him to establish it.<sup>84</sup>

The trustee may make a case under the third paragraph of section 67e by alleging and proving, first, the filing of the petition in bankruptcy, the adjudication, and his appointment and qualification as trustee of the estate of the bankrupt; second, the insolvency of the debtor at the time the transfer was made; third, that the transfer was made within four months prior to the filing of the petition in bankruptcy; and, fourth, that such transfer is null and void under the laws of the state, territory or district in which said property is situate. This last allegation should include all that would be necessary for a creditor to allege in the state court if he were suing to recover the property had bankruptcy not intervened. It seems that he should also show that he has not sufficient assets in his hands to satisfy the claims of the creditors of the bankrupt.<sup>85</sup>

82 Githens v. Shiffler, 112 Fed.
Rep. 505, 7 Am. B. R. 453; Lansing
Boiler & Engine Wks. v. Ryerson
(C. C. A. 6th Cir.), 128 Fed. Rep.
701, 63 C. C. A. 253, 11 Am. B. R.
558.

In what cases property may be recovered, see Sec. 382, ante.

<sup>83</sup> Johnston v. Forsyth Mercantile Co., 127 Fed. Rep. 845, 11 Am. B. R. 669. 84 McNulty v. Wiesen, 130 Fed.
Rep. 1012, 12 Am. B. R. 341; Lawrence v. Lowrie, 133 Fed. Rep. 995,
13 Am. B. R. 297; Horner-Gaylord
Co. v. Miller & Bennett, 147 Fed.
Rep. 295, 17 Am. B. R. 257.

85 Mueller v. Bruss, 112 Wis. 406,
 8 Am. B. R. 442; Prescott v. Galluccio, 164 Fed. Rep. 618, 21 Am.
 R. 229.

In a suit to set aside a conveyance under section 70e the trustee should allege and prove the filing of the petition in bankruptcy, the adjudication, and his appointment and qualification as trustee of the estate of the bankrupt. He should then state facts to show that the transfer complained of was one that some creditor of the bankrupt might avoid under the state laws as construed by the courts of the state. Such are usually transfers fraudulent at common law, but actual fraud is not essential to a recovery under Section 70e. The trustee is authorized to invoke for the estate the relief furnished by state laws to any creditor for annulling transfers of property. 87

A payment to an insurance company by an insolvent for an annuity, payments on which were to begin nine years later, was found to be fraudulent as to creditors, and the execution of the company's contract was not a payment of value to validate it. The trustee was not bound to trace the money to the present possession of the insurance company.<sup>88</sup>

It is not necessary to allege that the transfer was within four months. <sup>89</sup> He should show that he has not sufficient funds in his hands to satisfy the claims of the creditors of the bankrupt. <sup>90</sup>

86 In re Mullen, 101 Fed. Rep. 413,
4 Am. B. R. 224; Andrews v.
Mather, 134 Ala. 358, 9 Am. B. R.
296; Schreyer v. Scott, 134 U. S.
405, 409, 33 L. Ed. 955.

As to what transfers may be set aside, see Sec. 381, ante.

See *In re* Kayser (C. C. A. 3d Cir.), 177 Fed. Rep. 383, 100 C. C. A. 615, 24 Am. B. R. 174; *In re* Landsberger, 177 Fed. Rep. 443, 24 Am. B. R. 107.

87 Barber v. Coit (C. C. A. 6th
Cir.), 144 Fed. Rep. 381, 16 Am. B.
R. 419; Atkins v. Globe Bank & T.
Co. (Ky. Ct. of App.), 124 S. W.
Rep. 879; Manning v. Evans, 156

Fed. Rep. 106, 110, 19 Am. B. R. 217; Bush v. Export Storage Co., 136 Fed. Rep. 918, 14 Am. B. R. 138; In re Gray, 62 N. Y. Supp. 618, 3 Am. B. R. 647; Skillen v. Endleman, 79 N. Y. Supp. 413, 11 Am. B. R. 766.

88 Smith v. Mutual Life Ins. Co. of New York, 178 Fed. Rep. 510, 24 Am. B. R. 514.

89 In re Schenck, 116 Fed. Rep. 554, 8 Am. B. R. 927; In re Scrinopskie, 10 Am. B. R. 221.

90 Mueller v. Bruss, 112 Wis. 406, 8 Am. B. R. 442; Prescott v. Galluccio, 164 Fed. Rep. 618, 21 Am. B. R. 229.

## § 549. Defenses—Res judicata—Estoppel.

A judgment of a state court determining the same issues may be pleaded in bar of a suit by the trustee in a court of bankruptcy.<sup>91</sup>

The right of a trustee to maintain a suit to recover a preference is not barred by his failure to contest the claim presented by the preferred creditor against the bankrupt's estate. 92 The reason is that a suit by the trustee against a creditor to recover property belonging to the bankrupt's estate presents a different cause of action from a demand by that creditor against the bankrupt's estate, and hence is not *res judicata*.

An adjudication on the ground that mortgage is a preference is not *res judicata* in suit by trustee to recover the property mortgaged.<sup>92\*</sup>

The refusal of the court to make a summary order requiring delivery to referee is not a bar to a suit by the trustee to recover the property.<sup>92</sup>†

The trustee may be estopped to bring action by his own acts, so a trustee in treating a mortgage as valid in his petition for leave to sell the real estate and in the sale and in the deed made afterwards elects to affirm the mortgage and has no right to avoid it as a fraudulent preference. 98

Where a trustee brings action against the purchaser of goods for their value on the ground that the sale by the bankrupt was fraudulent and receives cash in settlement, this does not prevent him from recovering this *same* amount from creditors whom the bankrupt had *paid* preferentially with the money.<sup>94</sup>

91 In re Reynolds, 133 Fed. Rep. 585, 13 Am. B. R. 244; Linstroth Wagon Co. v. Ballew (C. C. A. 5th Cir.), 149 Fed. Rep. 960, 79 C. C. A. 470, 18 Am. B. R. 23.

92 Buder v. Columbia Dist. Co.,
96 Mo. App. 558, 9 Am. B. R. 331.
92\* Hussey v. Richardson Roberts Dry Goods Co. (C. C. A. 8th

Cir.), 148 Fed. Rep. 598, 78 C. C. A. 370, 17 Am. B. R. 511.

<sup>92</sup>†'Murray v. Joseph, 16 Am. F R. 704.

93 O'Neil v. International Trust Co., 183 Mass. 32, 66 N. E. 424.

<sup>94</sup> Sullivan v. King, 31 Tex. Civ. App. 432, 72 S. W. 207.

#### § 550. Statute of limitations.

An action by a trustee in a state court may be barred by the state statute of limitations.<sup>95</sup> Such suits must be brought within two years after the estate has been closed.<sup>96</sup>

## § 551. Recovery—Damages.

The express provision of the bankrupt act is that the trustee may, in case of a fraudulent preference or transfer, recover the property or the value of it from the person so receiving it or so to be benefited by it.<sup>97</sup> He can not recover property which is exempt under the state law.<sup>97\*</sup>

Where property has been sold at a judicial sale, or where a bona fide sale for a valuable consideration has been subsequently made by the person taking the property in fraud of creditors, it can not be recovered in specie. 98 The only remedy of the trustee is for the value of it. 99

The trustee can only insist on the property transferred and the value of property sold, and where the creditor preferred offers this, the trustee is bound to accept it and can not insist on the cash value placed on the property at the time it was received in payment of a pre-existing debt.<sup>100</sup>

A preferential transfer to creditors can be recovered by the trustee when the transferee has reasonable cause to believe that it was made with intent to hinder, delay or defraud other creditors and the consideration paid at the

95 Harrod v. Farrer, 68 Kan. 153. See Joseph v. Raff, 176 N. Y. 611, 68 N. E. 1118 (affirming 82 N. Y. App. Div. 47, 81 N. Y. Suppl. 546), to the effect that the trustee may proceed to set aside any transfer made by the bankrupt regardless of the time when it was made.

96 B. A. 1898, Sec. 11d.

<sup>97</sup> B. A. 1898, Sec. 60b and Sec. 70e, as amended by the statute of 1910, Sec. 11, 36 Stat. at L. 838.

97\* Vitzthum v. Large, 162 Fed. Rep. 685, 20 Am. B. R. 656. 98 Hackney v. First Nat. Bank, 68
 Neb. 594, 11 Am. B. R. 240.

99 Where property transferred can not be recovered in specie by the trustee, the latter may recover its value according to the inventory under the statute. McElvain v. Hardesty (C. C. A. 8th Cir.), 169 Fed. Rep. 31, 94 C. C. A. 399, 22 Am. B. R. 320.

<sup>100</sup> Russell v. Powell, Roberts & Finley, 38 Wash. 651, 80 P. 837.

time can not be offset. So where an insolvent sold his business for \$600 in cash and an antecedent debt for \$400 the trustee can recover the property or its value. A trustee, claiming title to land sold under a judgment he claims is invalid, has no right to have the judgment vacated, but has a perfect right to test his title by a real action for possession. The measure of damages in such cases is the actual value of the property at the time of the conveyance.

The trustee is not bound by the price paid by a purchaser at a judicial sale or otherwise as the value of the property. All kinds of damages are, strictly speaking, for the jury, and however clear and plain may be the rule of law on which the damages are to be founded, the act of finding is for it.<sup>4</sup> The best evidence of the value of goods claimed to be the subject of a preference was the price at which they were sold by the party, where the sale was made under conditions to obtain the greatest possible value for the property.<sup>5</sup>

The trustee is entitled to interest from the commencement of the suit.<sup>6</sup>

<sup>1</sup> Johnson v. Cohn, 39 N. Y. Misc. 189, 79 N. Y. Suppl. 139.

<sup>2</sup> Gage v. Bates Machine Co., 71 N. H. 384, 52 A. 457.

<sup>3</sup> Frank v. Musliner, 28 N. Y. L. J. 765, 9 Am. B. R. 229; Clarion Bank v. Jones, 21 Wall. 339, 22 L. Ed. 542; Conard v. Insurance Co., 6 Pet. 274, 8 L. Ed. 392; Comly v. Fisher No. 3053 Fed. Cas., Taney, 121; Marshall v. Knox, 16 Wall. 559, 21 L. Ed. 481; Eby v. Schomacher, 29 Penn. St. 40; Davis v. Anderson, No. 3623 Fed. Cas., 6 N. B. R. 145; *In re* Rosenberg, No. 12055 Fed. Cas., 3 Ben. 366; Smith v. Kehr, No. 13071, 2 Dill. 50.

<sup>4</sup> Alder v. Keighley, 15 M. & W. 117; Clarion Bank v. Jones, 21 Wall. 325, 22 L. Ed. 542.

<sup>5</sup> Ommen v. Talcott, 175 Fed. Rep. 261, 23 Am. B. R. 570; Allen v. McMannes, 156 Fed. Rep. 615, 19 Am. B. R. 276.

<sup>6</sup> Kaufman v. Treadway, 195 U. S. 271, 49 L. Ed. 190, 12 Am. B. R. 682. Where a creditor sold goods wrongfully transferred to him preferentially, interest at the legal rate was properly charged against him from the time when he sold the property. Ommen v. Talcott, 175 Fed. Rep. 261, 23 Am. B. R. 570.

#### § 552. Costs.

A court of bankruptcy or a district court of the United States will not ordinarily require security for costs of a trustee, but may do in its discretion.<sup>8</sup>

Where the trustee intervenes in an attachment proceeding it should be sustained and the costs incurred paid out of the proceeds of the attached property.9

Where the trustee succeeds in recovering property, costs may be taxed in his favor.9\*

## § 553. Effect of setting aside preference.

Where a preference is set aside the creditor's debt is extinguished by a discharge, unless he comes in and proves his debt like any other creditor.<sup>10</sup>

## § 554. Decree annulling fraudulent conveyance.

The decree annulling a fraudulent conveyance or transfer may contain a direction for a conveyance by a person holding title to the trustee in bankruptcy.<sup>11</sup>

Under the present act it may be doubted if it is necessary to direct such a conveyance because the title is vested in the trustee by operation of law. If the purchase was joint the judgment or decree of recovery should be joint. Where real estate has been conveyed to a bona fide purchaser by bankrupt's grantee before the commencement of a suit to recover, the judgment should not provide that the conveyance from bankrupt be

- 8 In re Barrett, 132 Fed. Rep. 362,
  12 Am. B. R. 626; Ryker v. Gwynne, 21 Am. B. R. 95.
- <sup>9</sup> Thompson v. Ragan, 117 Ky. 577, 78 S. W. 485, 25 Ky. L. Rep. 1864.
- 9\* Ommen v. Talcott, 175 Fed.Rep. 261, 23 Am. B. R. 572.
- 10 See Provable Debts, Chap. 19.11 Keating v. Keefer, No. 7635
- Fed. Cas., 5 N. B. R. 133; Burkholder v. Stump, No. 2165 Fed. Cas., 4 N. B. R. 597.
- <sup>12</sup> Schulenburg v. Kabwrech, No. 12487 Fed. Cas., 2 Dill. 132.

set aside, as this would cloud the *bona fide* purchaser's title. <sup>13</sup> A conveyance or transfer should be set aside *in toto* when the trustee elects to avoid it at all. <sup>14</sup>

Where pending an appeal in state court in suit where trustee was a party no supersedeas bond was given, the fund was properly paid to the trustee pending the appeal.<sup>15</sup>

Skillin v. Maibrunn, 78 N. Y.
 Supp. 436.
 Wehl v. Wald, 3 Fed. Rep. 93.
 R. 106.
 Skillin v. Maibrunn, 78 N. Y.
 In re National Lock & Metal Co., 155 Fed. Rep. 690, 19 Am. B.
 R. 106.

#### CHAPTER XXVIII.

#### HOW TO REDUCE THE ESTATE TO MONEY.

SEC. 555.	The general power of a trustee to collect and reduce estates to money.	SEC. 570. 571. 572.	Costs of sale. Unencumbered property. Encumbered property.
	By summary proceeding and order.	573.	
557.	By plenary action.		take encumbered property.
558.	Power to order bankrupt to sign papers.	574.	Where the trustee redeems the property by discharging encum-
559.	Placing estate in merchantable form.		brances.
560.	By sale.	575.	Where the trustee sells subject to
561.	Public or private accounts-ex-		liens.
	penses.	576.	Where trustee sells free of liens.
562.	Petition for sale.	577.	Trustee's right to sell pledge.
563.	Notice of sale.	578.	Lien of secured creditor.
564.	Appraisal,	579.	When a secured creditor may apply
565.	By whom sale made.		to have property, on which he
566.	Order for sale.		has a lien, sold.
567.	Purchasers.	580.	Disputed property.
	Confirmation—conveyance—title,	581.	
	Setting aside a sale.		

# § 555. The general power of a trustee to collect and reduce estates to money.

The trustee is required to collect and reduce to money the property of the estate for which he is trustee.<sup>1</sup> The courts of bankruptcy are given power to cause the estates of bankrupts to be collected, reduced to money and distributed and to determine controversies in relation thereto, except as otherwise provided by the statute.<sup>2</sup>

The trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interest of the estate.<sup>3</sup> The court may withhold its approval when it is for the interests of the estate not to settle on the terms proposed.<sup>4</sup>

<sup>1</sup> B. A. 1898, Sec. 47, clause 2, as amended June 25, 1910, 36 Stat. at L. 836. As to the duty of the trustee to collect the assets, see Sec. 358, ante.

<sup>2</sup> B. A. 1898, Sec. 2, clause 7. Compare R. S. Secs. 5062 to 5066,

act of June 22, 1874, 18 Stat. at L. 178. As to the jurisdiction of a court of bankruptcy in this respect, see Sec. 136, et seg., ante.

<sup>3</sup> B. A. 1898, Sec. 26, Gen. Ord.

\* In re Geiselhart, 181 Fed. Rep.

## § 556. By summary proceeding and order.

It is the duty of the bankrupt to deliver to the trustee as soon as he is appointed and qualified all of his property, real and personal, to be distributed among his creditors.

If he fails or refuses to do this he may be cited to answer a rule to show cause and the court may order him to turn over any such property in his possession or under his control to the trustee and enforce the order by commitment if he fails to obey it.<sup>5</sup> This order should be made only where it is clear that the property is missing,<sup>6</sup> and in the control of the bankrupt at the time of the order.<sup>7</sup>

The bankrupt should not be committed for contempt in failing to turn over property unless the court is satisfied beyond all reasonable doubt of his present ability to comply

622, 25 Am. B. R. 318; In re Meadows, Williams & Co., 181 Fed. Rep. 911, 25 Am. B. R. 100.

<sup>5</sup> Schweer v. Brown (C. C. A. 8th Cir.), 130 Fed. Rep. 328, 64 C. C. A. 547, 12 Am. B. R. 178; In re Rosser (C. C. A. 8th Cir.), 101 Fed. Rep. 562, 41 C. C. A. 497, 4 Am. B. R. 153; Ripon Knitting Wks. v. Schreiber, 101 Fed. Rep. 810, 4 Am. B. R. 299; In re Schlessinger (C. C. A. 2d Cir.), 102 Fed. Rep. 117, 42 C. C. A. 207, 4 Am. B. R. 361; In re Wilson, 116 Fed. Rep. 419, 8 Am. B. R. 612; In re Greenberg, 106 Fed. Rep. 496, 5 Am. B. R. 840; In re Purvine (C. C. A. 5th Cir.), 96 Fed. Rep. 192, 37 C. C. A. 446, 2 Am. B. R. 787; In re Gerstel, 123 Fed. Rep. 166, 10 Am. B. R. 411; In re Baum (C. C. A. 8th Cir.), 169 Fed. 410, 94 C. C. A. 632, 22 Am. B. R. 295, order to pay to trustee rather than register; In re Booss, 154 Fed. Rep. 494, 18 Am. B. R. 658 (permission refused to reopen case after hearing).

<sup>6</sup> In re Reese, 170 Fed. Rep. 986, 22 Am. B. R. 521 (no order issued where discrepancy was only \$150).

In re Averick, 170 Fed. Rep. 521, 22 Am. B. R. 518, a stock of goods of the value of \$5,000, was increased by other goods worth \$10,500 for which the bankrupt accounted for \$4,000 worth, was held concealment, requiring order to turn over balance.

<sup>7</sup> In re Barton Bros., 149 Fed. Rep. 620, 18 Am. B. R. 98; In re Adler, 170 Fed. Rep. 634, 21 Am. B. R. 371.

Where in an action by a trustee to recover money the evidence shows that the bankrupt controlled its possession and disposition the jury may infer that he is the owner. Waters v. Davis (C. C. A. 6th Cir.), 145 Fed. Rep. 912, 76 C. C. A. 444, 16 Am. B. R. 667.

with the order. While the receipt by the bankrupt of property and his failure to account for its disappearance may be a good ground to establish fraud this does not necessarily establish his present ability to comply with the order of court.8 The mere fact that money is traced to the bankrupts within a few months of the bankrupcy and that their explanation of the disposition of some items was not satisfactory, is not sufficient ground for an order in contempt. The courts should be very careful not to permit contempt proceedings to be converted into a means of coercing payments of debts from funds other than assets wrongfully withheld by the bankrupt.9 Where the court found that in 1908 the bankrupt had in his possession about \$3,000 belonging to his estate, the court two years later refused to imprison the bankrupt for failure to comply with an order to turn over this money, as it seemed that the bankrupt was unable to comply with such an order. The court remarks: "I do not think I have the right to imprison him at all, unless there is at least a doubt concerning his ability to comply with the order. In a doubtful case, I think it is clear that the court has the right, and may be under the duty to resort to imprisonment in order to test the sincerity of the bankrupt's denial" 10

The same procedure may be had to obtain property in the possession of an agent or bailee of property of the bankrupt, who does not claim title to, or an interest in the property in question. An assignee for the benefit of creditors is such an agent. He may be required in a summary proceeding to deliver to the trustee any property of the bankrupt in his possession by reason of the assignment. 13

<sup>8</sup> In re Dickens, 175 Fed. Rep. 808, 23 Am. B. R. 660.

<sup>&</sup>lt;sup>9</sup> In re Mize, 172 Fed. Rep. 945, 22 Am. B. R. 577.

<sup>&</sup>lt;sup>10</sup> In re Marks, 176 Fed. Rep. 1018, 23 Am. B. R. 911.

 <sup>&</sup>lt;sup>11</sup> Mueller v. Nugent, 184 U. S. 1,
 46 L. Ed. 405, 7 Am. B. R. 224; In

re Feldser, 134 Fed. Rep. 307, 14 Am. B. R. 216; In re Moore, 104 Fed. Rep. 869, 5 Am. B. R. 151.

 <sup>&</sup>lt;sup>12</sup> Bryan v. Bernheimer, 181 U. S.
 188, 45 L. Ed. 814, 5 Am. B. R. 523.
 <sup>13</sup> In re Stokes, 106 Fed. Rep. 312,
 6 Am. B. R. 262; In re Smith, 92
 Fed. Rep. 135, 2 Am. B. R. 9.

In the absence of express authority it is at least doubtful whether the appointment of a receiver gives him authority to designate another to act as his agent or representative in acquiring possession of the property of the bankrupt pending bankruptcy. In any event, the bankrupt or other person who refuses to deliver property to such alleged agent who shows no written authority but merely a certified copy of the order appointing the receiver should not be punished for contempt.<sup>14</sup>

## § 557. By plenary action.

Where the property claimed to belong to the estate of the bankrupt is in the possession of another person claiming title to, or an interest in it, the trustee must resort to a plenary action in a court, either state or federal, having jurisdiction. 14\*

This is necessary to recover property transferred as a preference or in fraud of creditors, <sup>15</sup> or to recover debts due the estate. <sup>16</sup> Where the assignee for creditors has transferred any part of such property to another person who claims title to, or an interest in it, the trustee must resort to plenary action to recover it, <sup>17</sup> and the same process must be used to settle the assignee's right to compensation. <sup>18</sup>

Where a corporation was organized to operate as a cloak to shield the bankrupt's property from seizure by his creditors, it was a fraud upon the creditors and the referee's orders to the receiver to seize the property were amply sustained by the proofs and were confirmed.<sup>19</sup>

14 Skubinsky v. Bodek (C. C. A.
3d Cir.), 172 Fed. Rep. 332, 340,
97 C. C. A. 116, 22 Am. B. R.
689, 699.

14\* See Sec. 540, ante.

<sup>15</sup> See Sec. 536, et seq., ante, where the nature of the suit and the court in which it should be brought are considered.

16 Section 537, ante; In re Water-loo Organ Co., 118 Fed. Rep. 904, 9Am. B. R. 427, Judge Hazel held

that a mortgagee in possession before he had right to be under the mortgage did not constitute him an adverse claimant.

17 Section 38; Louisville Trust Co.
 v. Comingor, 184 U. S. 18, 46 L.
 Ed. 413, 7 Am. B. R. 421.

<sup>18</sup> Goodnough Mercantile & Stock Co. v. Galloway, 171 Fed. Rep. 940, 22 Am. B. R. 803.

<sup>19</sup> In re Berkowitz, 173 Fed. Rep. • 1013, 22 Am. B. R. 227.

## § 558. Power to order bankrupt to sign papers.

The bankrupt may be required by order of the court to sign papers necessary to make his property available as assets, as to execute an instrument necessary to effectuate a sale of a seat in a stock exchange, 20 or the transfer of a liquor license, 21 or the transfer of a license of a stall in market, 22

#### § 559. Placing estate in merchantable form.

Where a great advantage will result to the estate and within a reasonable time, the trustee may be permitted to expend money for the purpose of putting the estate or any part of it in a merchantable form, <sup>23</sup> as by cutting timber, harvesting crops, and the like; and so of finishing unfinished goods. The court may authorize the trustee to conduct the business of the bankrupt for limited periods, if necessary for the best interests of the estate. <sup>24</sup>

#### § 560. By sale.

The estate of the bankrupt must be reduced to money in order to distribute it *pro rata* among his creditors. The estate may come to the trustee loaded with burdens. There may be valid mortgages or other liens on it, and there may be liens and mortgages whose validity is doubtful. Whatever interest the bankrupt has in such property must be determined and reduced to money. It is regularly done by selling the property.

The trustee may, "under the direction of the court," sell any property of the estate in his possession subject to, 26 or free

20 In re Hurlbutt, Hatch & Co.
 (C. C. A. 2d Cir.), 135 Fed. Rep.
 504, 68 C. C. A. 216, 13 Am. B. R.
 50.

21 In re Fisher, 98 Fed. Rep. 89,
 3 Am. B. R. 406; In re Becker, 98
 Fed. Rep. 407, 3 Am. B. R. 412.

<sup>22</sup> In re Emrich, 101 Fed. Rep.
 231, 4 Am. B. R. 89.

<sup>23</sup> In re Foster & Ames, No. 4965 Fed. Cas., 1 Low. 313.

<sup>24</sup> B. A. 1898, Sec. 2, clause 5, as amended Feb. 5, 1903, 32 Stat. at L. 797, and the Act of June 25, 1910, 36 Stat. at L. 838.

<sup>26</sup> J. W. West Lumber Co. v. Lyon (Tex. 1909), 116 S. W. 652, after sale under mortgage could not sell on a vendor's lien. from liens,<sup>27</sup> even where it is beyond the territorial jurisdiction of the court ordering the sale,<sup>27\*</sup> or transferred by the bankrupt in fraud of creditors.<sup>28</sup> The court may exhaust its power by one sale.<sup>29</sup>

#### § 561. Public or private Accounts—Expenses.

All sales must be by public auction unless otherwise ordered by the court.<sup>30</sup>

Upon application to the court, and for good cause shown, the trustee may be authorized to sell any specified portion of the bankrupt's estate at private sale, in which case he must keep an accurate account of each article sold, and the price received therefor, and to whom sold, which account he must file at once with the referee.<sup>31</sup>

Under the 79th equity rule, the accounts of a sale in bankruptcy should follow the old English practice by affidavit, "charge" and "discharge." 32

<sup>27</sup> In re Granite City Bank (C. C. A. 8th Cir.), 137 Fed. Rep. 818, 70 C. C. A. 316, 14 Am. B. R. 404; In re Wilka, 131 Fed. Rep. 1004, 12 Am. B. R. 727. See Annis v. Butterfield, 99 Me. 181, 58 A. 898. <sup>27\*</sup> Keller v. Faickney, 42 Tex. Civ. App, 483, 94 S. W. 103, though transfer voidable only. See Annis v. Butterfield, 99 Me. 181, 58 A. 898; James v. Kay (Tex. 1900), 59 S. W. 295.

<sup>28</sup> In re Union Trust Co. (C. C. A. 1st Cir.), 122 Fed. Rep. 937, 59 C. C. A. 461, 9 Am. B. R. 767; In re Shoe & Leather Reporter (C. C. A. 1st Cir.), 129 Fed. Rep. 588, 64 C. C. A. 156, 12 Am. B. R. 248; In re Granite City Bank (C. C. A. 8th .Cir.), 137 Fed. Rep. 818, 70 C. C. A. 316, 14 Am. B. R. 404; In re Keet, 128 Fed. Rep. 651, 11 Am. B. R. 117.

<sup>29</sup> Cramer v. Wilson, 195 U. S. 408, 40 L. Ed. 256; In re Muhlhauser (G. C. A. 6th Cir.), 121 Fed. Rep. 669, 57 C. C. A. 423, 10 Am. B. R. 236; In re Gerry, 112 Fed. Rep. 958, 7 Am. B. R. 459. See In re Baumblatt, 153 Fed. Rep. 485, 18 Am. B. R. 720, liquor license. Wisner v. Brown, 50 Mich. 553, 15 N. W. 901, power to sell depends solely on statute.

<sup>30</sup> Gen. Ord. 18. *In re* Cornell Co., 186 Fed. Rep. 859, the court rejected a bid by a reorganized corporation.

31 Gen. Ord. 18, par. 2. Official Form No. 45, see Form No. 83, post; In re Hawkins, 125 Fed. Rep. 633, 11 Am. B. R. 49; In re Gutterson, 136 Fed. Rep. 698, 14 Am. B. R. 495; In re Edes, 135 Fed. Rep. 595, 14 Am. B. R. 382.

<sup>32</sup> Ommen v. Talcott, 175 Fed.
 Rep. 261, 23 Am. B. R. 570.

Where a real estate broker duly licensed sells real estate at the instigation of the trustee, who makes no agreement as to compensation, but advises the broker he must petition the court for his commission, the discretion of the referee in denying the broker's petition filed subsequently will not be reversed on appeal.<sup>32</sup> \*

## § 562. Petition for sale.

Whenever it is necessary or advisable in the opinion of the trustee to make a sale, he should apply to the judge or referee, usually the referee, <sup>33</sup> for permission to sell property, specifying particularly what property is to be sold.

Where the trustee made a sale without authority and the sale was confirmed the confirmation was held equivalent to a prior order.<sup>34</sup>

The supreme court has prescribed forms of petitions and orders for the sale by auction of real estate,<sup>35</sup> for the redemption of property from lien,<sup>36</sup> for the sale of property subject to lien,<sup>37</sup> for a private sale of property,<sup>38</sup> and for a sale of perishable property.<sup>39</sup>

## § 563. Notice of sale.

The creditors must have ten days' notice of the proposed sale. 40

32\* Gold v. South Side Trust Co. (C. C. A. 3d Cir.), 179 Fed. 210, 102 C. C. A. 476, 24 Am. B. R. 578. 33 In re Fisher & Co., 135 Fed. Rep. 223, 14 Am. B. R. 366; In re Rosenberg, 116 Fed. Rep. 402, 8 Am. B. R. 624; Chauncey v. Dyke Bros. (C. C. A. 8th Cir.), 119 Fed. Rep. 1, 55 C. C. A. 579, 9 Am. B. R. 444; Carroll Co. v. Young (C. C. A. 3d Cir.), 119 Fed. Rep. 576, 578, 56 C. C. A. 380, 9 Am. B. R. 643, 645; In re Gerry, 112 Fed. Rep. 958, 7 Am. B. R. 459.

<sup>34</sup> In re Harvey, 122 Fed. Rep. 745, 10 Am. B. R. 567; In re Fui-

ton, 153 Fed. Rep. 664, 18 Am. B. R. 591.

35 Official Form No. 42; see Form No. 72, post.

<sup>36</sup> Official Form No. 43; see Form No. 73, post.

<sup>37</sup> Official Form No. 44; see Form No. 77, post.

<sup>38</sup> Official Form No. 45; see Form No. 83, *post*.

39 Official Form No. 46; see Form No. 84, post.

40 B. A. 1898, Sec. 58a, as amended by statute June 25, 1910, Sec. 9½, 36 Stat. at I. 838. But see In rc Hawkins, 125 Fed. Rep. 633, 11 Am. B. R. 49.

There is no provision of the bankrupt act or general orders requiring a sale to be advertised in a newspaper. Congress has provided by special act the manner in which property shall be sold under an order, judgment or decree of any United States court. It provides for a public sale at the courthouse or upon the premises and for publication of notice of the sale of real estate in a county newspaper once a week for at least four weeks prior to the sale. It has been held that the act of 1893 does not apply to sales in bankruptcy proceedings. The act of 1893 by express terms applies to all United States courts, which clearly includes courts of bankruptcy. It is not expressly repealed or modified in any respect by the bankrupt act. The omission in that act to regulate in any way the manner of making a sale in bankruptcy proceedings shows that Congress, having by special

<sup>41</sup> The act of March 3, 1893, 27 Stat. at L. 751, provides:

"Sec. 1. That all real estate or any interest in land sold under any order or decree of any United States court shall be sold at public sale at the courthouse of the county, parish, or city in which the property, or the greater part thereof, is located, or upon the premises, as the court rendering such order or decree of sale may direct.

"Sec. 2. That all personal property sold under any order or decree of any court of the United States shall be sold as provided in the first section of this act, unless in the opinion of the court rendering such order or decree, it would be best to sell it in some other manner.

"Sec. 3. That hereafter no sale of real estate under any order, judgment, or decree of any United States court shall be had without previous publications of notices of such proposed sale being ordered,

and had once a week, for at least four weeks, prior to such sale in at least one newspaper printed, regularly issued and having a general circulation in the county and state where the real estate proposed to be sold is situated, if such there be. If said property shall be situated in more than one county or state, such notice shall be published in such of the counties where said property is situated, as the court may direct. Said notice shall, among other things, describe the real estate to be sold. The court may, in its discretion, direct the publication of the notice of sale herein provided for to be made in such other papers as may seem proper."

<sup>42</sup> Twenty-seven days is not sufficient. Wilson v. Northwestern Mutual Life Insurance Co. (C. C. A. 8th Cir.), 65 Fed. Rep. 38, 12 C. C. A. 505.

<sup>43</sup> In re Edes, 135 Fed. Rep. 595, 14 Am. B. R. 382.

act made all necessary provisions for such sale, did not see fit to further legislate on the subject. The act of 1893 has been held to be directory and not mandatory and that if it is not followed and no objection is made to the irregularity until after confirmation, the sale is valid and the purchaser's title good. Whether it is binding on courts of bankruptcy or not, it is safe and proper for a court of bankruptcy to conform to this statute by ordering a sale in bankruptcy. By section 2 of the act of 1893, the judge may order personal property sold in some other manner when it seems best to him to do so. The advertisement relates only to real estate.

#### § 564. Appraisal.

Before the date of sale of real or personal property belonging to the bankrupt's estate it must be appraised by three disinterested appraisers, 45 whose report is controlling. 46 The appraisers are appointed by and report to the judge or referee, 47 usually the referee.

The appraisers are entitled to a reasonable fee for their services. 47\*

## § 565. By whom sale made.

A sale is regularly made by the trustee, but the court may appoint commissioners to make it,<sup>48</sup> or the court may appoint an official auctioneer.<sup>49</sup>

44 National Nickel Co. v. Nevada Nickel Syndicate (C. C. A. 9th Cir.), 112 Fed. Rep. 44, 50 C. C. A. 113, in court below, 106 Fed. Rep. 110, 103 Fed. Rep. 391; Black v. Black, 77 Fed. Rep. 785; Godchaux v. Morris (C. C. A. 5th Cir.), 121 Fed. Rep. 482, 57 C. C. A. 434.

<sup>45</sup> B. A. 1898, Sec. 70b.

46 Schuler v. Hassinger (C. C. A.

5th Cir.), 177 Fed. Rep. 119, 100 C. C. A. 539, 24 Am. B. R. 184.

<sup>47</sup> B. A. 1898, Sec. 70b; In re Columbia Iron Works, 142 Fed. Rep. 234, 14 Am. B. R. 526.

47\* In re Fidler & Son, 172 Fed. Rep. 632, 23 Am. B. R. 16.

<sup>48</sup> Sturgiss v. Corbin (C. C. A. 4th Cir.), 141 Fed. Rep. 1, 72 C. C. A. 179, 15 Am. B. R. 543.

<sup>49</sup> In re Benjamin, 136 Fed. Rep. 175, 14 Am. B. R. 481.

A receiver has been permitted to sell property in his possession under an order of court,<sup>50</sup> but he can not sell property of the bankrupt in the possession of a person claiming to own it.<sup>51</sup>

The bankruptcy court may allow the sale to proceed in the state court when advantageous to the estate,<sup>52</sup> but usually the state court should turn the property over to the trustee.<sup>53</sup>

#### § 566. Order for sale.

The trustee has wide latitude as to when he shall proceed to sell under an order.<sup>54</sup>

Where the trustee is acting under an order of sale, he should proceed in accordance with the provision of the order. Anything which he may do in conflict with or in violation of such order is null and void. Under an order to sell for the highest price he can obtain, he must accept the highest bid, although he has previously agreed to sell to another person for a certain price, and to wait for an answer for a certain time, which period has not expired at the time of receiving the better bid. <sup>55</sup>

An upset price need not be inserted in the order,<sup>56</sup> and the consideration need not necessarily be paid in cash.<sup>57</sup>

50 In re LeVay, 125 Fed. Rep. 990,
11 Am. B. R. 114; In re Becker,
98 Fed. Rep. 407, 3 Am. B. R. 412;
In re Fulton, 153 Fed. Rep. 664, 18
Am. B. R. 591; Mason v. Wolkowich (C. C. A. 1st Cir.), 150 Fed.
Rep. 699, 80 C. C. A. 435, 17 Am.
B. R. 709.

<sup>51</sup> Beach v. Macon Grocery Co.
(C. C. A. 5th Cir.), 116 Fed. Rep.
143, 53 C. C. A. 463, 8 Am. B. R.
751, 125 Fed. Rep. 513, 60 C. C.
A. 557, 11 Am. B. R. 104.

<sup>52</sup> In re Sterlingworth Ry. Supply .Co., 165 Fed. 267, 21 Am. B. R. 342.

<sup>53</sup> Carpenter Bros. v. O'Connor, 16 Ohio Cir. 526, 9 Ohio Cir. Dec. 201.

54 Potter v. Martin, 122 Mich.542, 81 N. W. 424.

<sup>55</sup> In re Ryan, No. 12182 Fed. Cas., s.c. 6 N. B. R. 235; Sturgiss v. Corbin (C. C. A. 4th Cir.), 141 Fed. Rep. 1, 72 C. C. A. 179, 15 Am. B. R. 543.

be The court finds no limit otherwise than the law, which provides that the sale shall not be made for less than 75 per cent. of the appraised value, except with the approval of the court. Schuler v. Hassinger (C. C. A. 5th Cir.), 177 Fed. Rep. 119, 100 C. C. A. 539, 24 Am. B. R. 184.

<sup>57</sup> The fact that the purchaser was permitted by the terms of the order of sale to turn in, in payment of the price admitted securities does not render the terms of sale unfair, and stifle competition on the

An order of sale of property is not an adjudication of its title.<sup>58</sup>

#### § 567. Purchasers.

As a general rule, any person may bid and purchase at a public or private sale by a trustee.

The bankrupt may purchase at such a sale.<sup>59</sup> The trustee,<sup>60</sup> or an attorney or agent of the trustee,<sup>61</sup> or a referee,<sup>62</sup> can not purchase at such a sale; but if the trustee, having purchased, makes improvements he is entitled to be reimbursed their value.<sup>63</sup> An appraiser before he has filed his appraisal, may not purchase at a public sale of the bankrupt's assets, for reasons of public policy and equity and because under the express provisions of the bankruptcy act the appraisers must be disinterested. The court does not decide whether an appraiser is still disqualified to purchase after he has filed his appraisal.\*

Holders of the bonds of a bankrupt corporation, secured by a mortgage, which gives them the right to use such bonds in the purchase of the property if sold at judicial sale, should not be deprived of such right by an order authorizing the trustee to sell the property free from liens, so long as their title to the bonds is unimpeached.<sup>64</sup>

The trustee need not adjourn a sale for the purpose of giving a bidder time to search the title.<sup>65</sup>

ground that other persons were bound to pay cash. Schuler v. Hassinger (C. C. A. 5th Cir.), 177 Fed. Rep. 119, 100 C. C. A. 539, 24 Am. B. R. 184.

<sup>58</sup> Wilkins v. Tourtellott, 28 Kan. 589.

59 Arnold v. Leonard, 20 Miss. 258, Shesler v Patton, 114 N. Y. App. Div. 846, 100 N. Y. Suppl. 286, 17 Am. B. R. 372; Hallyburton v. Slagle, 130 N. C. 482, 41 S. E. 877 under the act of 1867; Trumbo v. Fulk, 103 Va. 73, 48 S. E. 525.

60 In re Hawley, 117 Fed. Rep. 364, 9 Am. B. R. 61.

<sup>61</sup> Citizens Bank v. Ober, No. 2731 Fed. Cas., 1 Woods, 80.

62 B. A. 1898, Sec. 39b.

68 In re Hawley, 117 Fed. Rep. 364, 9 Am. B. R. 61.

\*In re Frazin & Oppenheim (C. C. A. 2d Cir.), 181 Fed. Rep. 307, 109 C. C. A. —, 24 Am. B. R. 598, 903.

<sup>64</sup> In re Saxton Furnace Co., 136 Fed. Rep. 697, 14 Am. B. R. 483.

65 Hills v. Alden, No. 6507 Fed. Cas., s. c. 2 Hask. 299.

Where a sale is fairly made, and the bids are understood by the bystanders and the auctioneer, it will be a valid sale, although the trustee is present, but, in consequence of his negligence and inattention, fails to understand the terms thereof. Such a purchaser can compel a transfer of property to him by the trustee, or may sue in trover for refusal to deliver.

The purchaser is also bound by the terms of the sale,<sup>68</sup> and is liable for a loss on resale caused by his failure to carry out the terms of the sale.<sup>69</sup> An allowance for shortage made to a purchaser in one case does not control the terms of a sale to another purchaser.<sup>70</sup>

The rights in the deposit money paid at the time of the sale depend on the terms of the deposit.<sup>71</sup>

The purchaser gets only what is specifically sold, 73 including sometimes a right of action to recover the property

<sup>66</sup> Ives v. Treget, 29 Mich. 390; Russell v. Phelps, 42 Mich. 388; Voorheis v. Frisbie, 25 Mich. 576, and note 1 (annotated ed.). See also as to right of purchase at sale. Sturgiss v. Corbin (C. C. A. 4th Cir.), 141 Fed. Rep. 1, 72 C. C. A. 179, 15 Am. B. R. 543.

67 Ives v. Tregent, 29 Mich. 390.
68 Owens v. Bruce (C. C. A. 4th Cir.), 109 Fed. Rep. 72, 48 C. C. A. 239, 6 Am. B. R. 322; In re Wylie (C. C. A. 3d Cir.), 153 Fed. Rep. 281, 82 C. C. A. 411, 18 Am. B. R. 503, affirming In re W. F. Fisher & Co., 148 Fed. 907, 17 Am. B. R. 404.

69 In re Jungmann (C. C. A. 2d Cir.), 186 Fed. Rep. 303, 109 C. C. A. —, 26 Am. B. R. 401; Mason v. Wolkowich (C. C. A. 1st Cir.), 150 Fed. Rep. 699, 80 C. C. A. 435, 17 Am. B. R. 709; In re Drumgoole, 140 Fed. Rep. 208, 15 Am. B. R. 261.

<sup>70</sup> Snyder v. Bougher, 214 Pa. St. 453, 16 Am. B. R. 792.

71 Where a sale of a liquor license is held and a deposit made of \$500 to be forfeited in case the purchaser is refused a transfer of the license for his unfitness and the license is refused him for that reason he is not entitled to a return of the deposit made. In re Comer & Co., 171 Fed. Rep. 261, 22 Am. B. R. 558. A "sale subject to the transfer of license by Court of Quarter Sessions" entitles the purchaser to a return of his money on refusal of transfer of his license. In re Miller, 171 Fed. Rep. 263, 22 Am, B. R. 759.

73 Jetter Brew. Co. v. Scollan, 96 N. Y. Supp. 274, 48 N. Y. Misc. 546, affd. 100 N. Y. Suppl. 1122, 15 Am. B. R. 300, sale of premises used as a hotel and liquor store does not include an agreement as to sale of beer.

sold,<sup>74</sup> and the good will of a business.<sup>75</sup> The purchaser takes only the title which the bankrupt and the trustee had.<sup>78</sup>

#### § 568. Confirmation—Conveyance—Title.

It is not absolutely necessary that a sale be confirmed by the court, but all real and personal property must, when practicable, be sold, subject to the approval of the court,<sup>80</sup> which approval will be withheld when the sale was not open

Where a bankrupt bought from his trustee a claim against A. this gives him no right to bring suit against B. as undisclosed principal of A. as he got no such claim from the trustee. Shesler v. Patton, 114 N. Y. App. Div. 846, 100 N. Y. Suppl. 286, 17 Am. B. R. 372.

<sup>74</sup> A sale by a trustee of personal property passes to the purchaser the right to bring suit to set aside an assignment of the same property by the bankrupt claimed to be a preference. Bryan v. Madden, 79 N. Y. App. Div. 636, 80 N. Y. Suppl. 1131 (affirming 38 Misc. 638, 78 N. Y. Suppl. 220).

A sale by an assignee of "all property and all the rights of action which he received as assignee" does not include a mere right to bring an action to set aside a conveyance as fraudulent. The court holds that this would be dangerous as it would promote litigation. McMaster v. Campbell, 41 Mich. 513, 2 N. W. 836.

As a creditor can not maintain a bill in equity, to set aside a fraudulent conveyance in Maine without showing possession, a purchaser of land from the trustee which the bankrupt had' fraudulently conveyed can not maintain the bill where he was never in possession. The court does not decide whether

the trustee can sell estate which had previously been conveyed without obtaining an adjudication of the fraud. Annis v. Butterfield, 99 Me. 181, 58 A. 898.

<sup>75</sup> The purchaser may advertise himself as "successor" to the bankrupt where he buys the stock in trade. Freeman v. Freeman, 86 N. Y. App. Div. 110, 83 N. Y. Suppl. 478.

78 Jacob v. Kellogg, 56 Misc. (N. Y.) 61, 107 N. Y. Suppl. 713, in tenant's fixtures; Asheville Supply & Foundry Co. v. Machin, 150 N. C. 738, 64 S. E. 887.

Where the first taker of land under a will was alive when the second taker went into bankruptcy, his assignee had no title as the bankrupt had none and so the purchaser took nothing. Watson v. Conrad, 38 W. Va. 538, 18 S. E. 744. In re Ketterer Mfg. Co. 162 Fed. 583, 20 Am. B. R. 694, purchaser of lease barred by right to apply rent in payment of taxes.

80 B. A. 1898, Sec. 70b; In re Shea (C. C. A. 1st Cir.), 126 Fed. Rep. 153, 61 C. C. A. 219, 11 Am. B. R. 207, the court said: "We do not undertake to say that Sec. 70b requires always a formal approval. If a sale is made and silently acquiesced in for a considerable time, or if the proceeds thereof

and fair.<sup>83</sup> It can not be sold otherwise than subject to the approval of the court for less than seventy-five *per centum* of its appraised value.<sup>84</sup>

Where the sale has been confirmed by the court the title to the property is conveyed to the purchaser by the trustee. The property is sold free of liens the purchaser is entitled to a deed to the property released and discharged of all incumbrances whatsoever, including taxes. Where it is sold subject to liens, only the title to the bankrupt's interest is transferred, and the rule of third persons claiming adversely is in no way affected. The conveyance of real estate is made by deed, which should recite the bankruptcy proceedings, the appointment and qualification of the trustee and the proceedings relating to the sale and the confirmation by the court and is executed by the trustee as other deeds in the state where the property is situated.

A court of bankruptcy has no power to restrain the trustee from making a deed to the purchaser or to compel a specific performance of an alleged contract between the petitioner

are credited in the trustee's account, and the account is passed, either may be held to meet the requirements of the statute."

Refusal by a referee to approve a sale is refusal by the court. Davis v. Ives, 75 Conn. 611, 54 A. 922.

Where the sale is confirmed on report of the trustee that he has received cash, he is bound to pay cash to the creditors, though he in fact only received bank books which turned out to be worthless. *In re* Augusta Pottery Co., 163 Fed. Rep. 1011, 21 Am. B. R. 64. See James v. Kay (Tex. 1900), 59 S. W. 295, under the act of 1867, a sale was valid though not reported back to the court for approval.

83 In re Cornell Co., 186 Fed. Rep. 856, the court rejected a bid by a reorganized corporation to take over the assets. In re Ketterer Mfg. Co., 156 Fed. 719, 19 Am. B. R. 638, but a private agreement of the auctioneer with the purchaser to raise other bids will not prevent confirmation.

84 B. A. 1898, Sec. 70b.

<sup>85</sup> B. A. 1898, Sec. 70c.

86 In re Keller, 109 Fed. Rep.
131, 6 Am. B. R. 351; In re Prince
& Walter, 131 Fed. Rep. 546, 12
Am. B. R. 675.

87 In re Muhlhauser (C. C. A. 6th Cir.), 121 Fed. Rep. 669, 57 C. C. A. 423, 10 Am. B. R. 236; Cramer v. Wilson, 195 U. S. 409, 49 L. Ed. 256.

88 For form of deed to real estate, see Form No. 165, post.

and the purchaser relating to a division of the land sold.<sup>89</sup> A controversy between third persons is not a part of the bankruptcy proceeding.

## § 569. Setting aside a sale.

The contest, with reference to the validity of the sale, is usually made at the time of the application to the court to confirm the sale. The court will not refuse to confirm a sale or set it aside after it has been confirmed merely because a higher bid is offered, 90 or because the price is adequate. 91 There must be circumstances impeaching the validity of the sale or such gross inadequacy as to shock the conscience. 92

The court of bankruptcy has power, in its discretion, to set aside a sale even where such sale has been consummated by the delivery of a deed.<sup>93</sup> In case money has been deposited or paid, it should be ordered to be refunded by the trustee. Thus a sale may be set aside on the ground of fraud or collusion,<sup>94</sup> or because the sale is illegal, as in not

<sup>89</sup> Henrie v. Henderson (C. C. A. 4th Cir.), 145 Fed. Rep. 316, 76 C. C. A. 196, 16 Am. B. R. 617. <sup>90</sup> In re Ethier, 118 Fed. Rep. 107, 9 Am. B. R. 160; In re Belden, 120 Fed. Rep. 524, 9 Am. B. R. 679; Sturgiss v. Corbin (C. C. A. 4th Cir.), 141 Fed. Rep. 1, 72 C. C. A. 179, 15 Am. B. R. 543; Matter of Mitchell, 116 Fed. Rep. 87, 15 Am. B. R. 735.

A judicial sale will not be set aside because a slightly higher bid made by a buyer which was not accompanied by the required deposit. In re Throckmorton (C. C. A. 6th Cir.), 149 Fed. 145, 79 C. C. A. 15, 17 Am. B. R. 856. See Ex parte Klein Bros. (C. C. A. 1st Cir.), 126 Fed. 153, 61 C. C. A. 219, 11 Am. B. R. 207 (1st Cir.). Resale properly ordered where three times the former bid could be realized.

91 In re Thompson, 2 Am. B. R. 216; In re Shapiro, 154 Fed. 673, 19 Am. B. R. 125. (Here goods appraised at \$5,000, sold for \$3,400. An offer to pay \$3,800, not enough to warrant a resale.)

92 In re Ethier, 118 Fed. Rep. 107,
9 Am. B. R. 160; Magann v. Segal
(C. C. A. 6th Cir.),
92 Fed. Rep. 252,
34 C. C. A. 323; In re Shapiro,
154 Fed. 673,
19 Am. B. R. 125.

<sup>93</sup> In re Mott, No. 9878 Fed. Cas., In re Stevenson, 6 Fed. Rep. 710; In re Hyde, 6 Fed. Rep. 587; Ex parte Bryan, No. 2061 Fed. Cas., 2 Hughes, 273.

94 In re Ethier, 118 Fed. Rep. 107,
9 Am. B. R. 160; In re Finlay,
104 Fed. Rep. 675, 3 Am. B. R.
738; In re Conant, No. 3085 Fed.
Cas., cited In re King, 3 Fed. Rep.
842; In re Hyde, 6 Fed. Rep. 592;
Clark v. Clark, 17 How. 315, 15
L. Ed. 77; In re Stevenson, 6 Fed.
Rep. 710.

selling to the highest bidder, 96 or in selling to an appraiser, 97 or selling property unlawfully in the possession of the trustee, 98 or as made under an illegal or irregular order, 99 or without notice, 100 or any misconduct on the part of the trustee, 1 and this may be done, although the purchaser is entirely innocent and although the sale was not made subject to the order of the court. 2 In deciding whether or not a sale shall be set aside, the court will give much weight to objection on the part of the creditors, 3

Under the present statute if a sale is made for less than seventy-five per centum of the appraised value it would seem to be sufficient ground for setting aside the sale, irrespective of whether any fraud or collusion was shown, provided it was made otherwise than subject to the approval of the court.<sup>4</sup> The mere nondelivery of a deed by the trustee is not sufficient cause for setting aside a sale, otherwise regular, and ordering a resale.<sup>5</sup>

But see Hills v. Alden, No. 6507 Fed. Cas., 2 Hasck, 299, as to what is not evidence of fraud.

The fact that property was purchased at a sale by a reorganization committee does not make the sale collusive, and approval of a plan which looked to the successful settlement and winding up of the bankrupt estate, and which had the consent of all parties interested, was perfectly proper. Schuler v. Hassinger (C. C. A. 5th Cir.), 177 Fed. Rep. 119, 100 C. C. A. 539, 24 Am. B. R. 184.

<sup>96</sup> In re Ryan, No. 12182 Fed. Cas., 6 N. B. R. 235.

97 In re Frazin & Oppenheim (C. C. A. 2d Cir.), 181 Fed. Rep. 307, 109 C. C. A. —, 24 Am. B. R. 598, 903 (whether or not the price was adequate).

98 Davis v. R. C. Co., No. 3648 Fed. Cas., 1 Woods, 661. <sup>99</sup> Ex parte Bryan, No. 2061 Fed. Cas., 2 Hughes, 273; In re Mott, No. 8978 Fed. Cas.

100 Allgair v. Fisher (C. C. A.
 3d Cir.), 143 Fed. 962, 75 C. C.
 A. 148, 16 Am. B. R. 278.

<sup>1</sup> In re Shea, 122 Fed. Rep. 742, 10 Am. B. R. 481; petition for review dismissed (C. C. A. 1st Cir.), 126 Fed. Rep. 153, 61 C. C. A. 219, 11 Am. B. R. 207; In re Belden, 120 Fed. Rep. 524, 9 Am. B. R. 679. <sup>2</sup> In re Shea, 122 Fed. Rep. 742, 10 Am. B. R. 481. Petition for review dismissed (C. C. A. 1st Cir.), 126 Fed. Rep. 153, 61 C. C. A. 219, 11 Am. B. R. 207.

8 In re Belden, 120 Fed. Rep. 524,9 Am. B. R. 679.

<sup>4</sup> B. A. 1898, Sec. 70b.

<sup>5</sup> In re Finlay, 104 Fed. Rep. 675, 4 Am. B. R. 745.

A sale made by an assignee for the benefit of creditors may be set aside and suit brought by the trustee to recover property fraudulently conveyed which was used in purchasing at assignee's sale.<sup>6</sup>

#### § 570. Costs of sale.

The expenses of a sale are ordinarily legitimate costs of administration, and should be paid first, out of the proceeds of the property sold.<sup>7</sup>

Such costs are left by statute in the discretion of the court,<sup>9</sup> and questions arising in relation to them must be disposed of upon equitable principles.

Where a mortgage is apparently fraudulent, and creditors have endeavored to have it declared void, such creditors are entitled to be reimbursed the amount of their reasonable costs, expenses and disbursements in the proceedings in bankruptcy, including the sale of the mortgaged property, from the proceeds of such sale.<sup>10</sup>

Where a secured creditor seeks and enjoys the aid of the bankruptcy court in enforcing and releasing his lien, he should pay the costs incurred in obtaining this aid. <sup>11</sup> But with regard to the costs of general administration, in which he has no concern, and in which he can have no interest

6 In re King, 3 Fed. Rep. 839.
See also Owens v. Bruce (C. C. A. 4th Cir.), 109 Fed. Rep. 72, 48 C.
C. A. 239, 6 Am. B. R. 322.

<sup>7</sup> In re Sanderlin, 109 Fed. Rep. 857, 6 Am. B. R. 384, affirmed in McNair v. McIntyre (C. C. A. 4th Cir.), 113 Fed. Rep. 113, 51 C. C. A. 89, 7 Am. B. R. 638; In re S. D. A. Duncan, 148 Fed. 464, 2 Am. B. R. 321. Claim of attorney for mortgagee allowed under stipulation of mortgage on sale by the trustee in bankruptcy of the mortgaged property in Penn-

sylvania. In re Wendel, 152 Fed. 672, 18 Am. B. R. 665.

<sup>9</sup> B. A. 1898, Sec. 2, clause 18.
 <sup>10</sup> In re Dumont, No. 4127 Fed.
 Cas., 4 N. B. R. 17.

<sup>11</sup> In re Utt (C. C. A. 7th Cir.), 105 Fed. Rep. 754, 45 C. C. A. 32, 5 Am. B. R. 383; In re Alison Lumber Co., 137 Fed. Rep. 643, 14 Am. B. R. 78; In re Cogley, 107 Fed. Rep. 73, 5 Am. B. R. 731; McNair v. McIntyre (C. C. A. 4th Cir.), 113 Fed. Rep. 113, 51 C. C. A. 89, 7 Am. B. R. 638; In re Goldsmith, 118 Fed. Rep. 763, 9 Am. B. R. 419.

until his lien is either satisfied or released, it would be inequitable to require him to bear the burden of them. 12

Creditors who have failed to obtain a review of an order directing a private sale of the bankrupt's property may be required to pay the incidental expenses attending the sale.<sup>13</sup>

## § 571. Unencumbered property.

Under the general power conferred upon the court and trustee, such parts of the estate, real and personal, as come into the possession of the trustee unencumbered by mortgage or lien, may be sold by the trustee under the direction of the court.<sup>14</sup>

The trustee may be authorized to compromise or sell and assign, in such manner as the judge or referee may order, any outstanding claims or other property in his hands due or belonging to the estate, which can not be collected or received by him without unreasonable or inconvenient delay or expense.<sup>15</sup>

The trustee may apply to the referee for permission to sell such property by auction or at private sale.<sup>16</sup> In the case of real estate, it may be sold in lots or parcels or as a whole, as the referee may direct.

In re Alison Lumber Co., 137 Fed. Rep. 643, 648, 14 Am. B. R. 78. 84. After referring to costs incurred in the state court, Judge Speer said: "The expenses and costs of the bankruptcy court stand upon a superior footing, and, if there is not sufficient money arising from the sale of unpledged property to pay them, it seems that the secured creditors should contribute ratably to that purpose. They have appeared in the bankruptcy court, selected it as their forum, availed themselves of the services of its officers, and utilized its process to collect their claims. We have no doubt of their duty to contribute to pay all such costs and expenses."

12 In re Williams Estate (C. C. A.
9th Cir.), 156 Fed. Rep. 932, 84
C. C. A. 434, 19 Am. B. R. 389; In re Hambright, No. 5973 Fed. Cas., 2
N. B. R. 498; In re Davenport, No. 3587 Fed. Cas., 3
N. B. R. 77; In re York, No. 18138 Fed. Cas., 3
N. B. R. 661.

<sup>13</sup> In re Johnston, No. 7424 Fed. Cas., 25 Pitts. Leg. J. 141.

14 In re Goldsmith, 9 Am. B. R.
 419, 118 Fed. Rep. 763; In re
 Matthews, 109 Fed. Rep. 603, 6
 Am. B. R. 96.

<sup>15</sup> B. A. 1898, Sec. 27; Gen. Ord. 28. Compare R. S. Secs. 5061 and 5064.

<sup>18</sup> As to private sales, see *In re* Kirtland, No. 7851 Fed. Cas., 10 Blatch. 515; *In re* Stevenson, 6 Fed. Rep. 710.

The application for leave to sell property is made by petition. The petition should be entitled in the court and cause and allege that it would be for the benefit of the estate that certain property, describing it, and its estimated value, should be sold by auction or at private sale, as may be desired. In case it is desired to have it sold at private sale, the reasons or advantages to be obtained by selling at private sale should be set forth in the petition. The property to be sold, either at auction or at private sale, should be specifically described. The petition should conclude with a prayer that the trustee may be authorized to make the sale by auction or at private sale, as may be. The petition is dated and signed by the trustee without verification.

The referee, as soon as the petition is filed, should give ten days' notice by mail to the creditors of the bankrupt of the hearing on such petition. At the time and place mentioned in the notice a hearing is had, at which evidence may be introduced and counsel heard in favor of the petition and in opposition thereto; on consideration whereof the referee may pass an order that the trustee be authorized to sell the property as prayed in the petition, or may refuse to grant such leave as in his judgment is most advantageous to the estate. If leave for sale is given, the referee should require the trustee to keep an accurate account of each article or lot sold, and the price therefor and to whom sold, and that an account thereof shall be filed at once with the referee.

## § 572. Encumbered property.

Where property of the bankrupt is in the possession of a mortgagee, pledgee, or other lienor, the trustee can not sell it without the consent of the secured creditor. The reason is that a court of bankruptcy has no power to bring in such person as a party to the bankruptcy proceedings or an independent suit, unless the property is in *custodia legis*. The

Official Forms Nos. 42 to 45;
 Forms Nos. 72 to 84, post.
 B. A. 1898, Sec. 58a.

First Nat. Bank v. Title & Trust Co., 198 U. S. 280, 49 L. Ed.
 1051, 14 Am. B. R. 102.

court of bankruptcy, however, may sell the property with his consent. It is sometimes convenient and to the advantage of the secured creditor and the estate to have such property administered by the trustee. The secured creditor may voluntarily appear in the bankruptcy proceedings. Proving his claim as a secured creditor makes him a party to the proceedings in bankruptcy and subjects him to the order of the court. But unless the court gets jurisdiction of the person or the property, the trustee can not sell it.

Where the property of the bankrupt in the possession of the trustee or otherwise in custodia legis is burdened with mortgages, liens, and encumbrances, several courses are open, namely: First, the trustee may elect not to take such property. Second, he may redeem the property by discharging the encumbrances. Third, he may sell the bankrupt's interest without affecting the rights of secured creditors in the property. Fourth, he may sell the property free from all liens whatsoever. These courses are considered more at length in the next few sections.

The court on sale will determine the amounts of the liens,<sup>20</sup> even where mortgaged and unmortgaged property is sold together and the proceeds mingled.<sup>21</sup>

# § 573. Where the trustee elects not to take encumbered property.

Where property comes into the possession of the trustee so burdened with mortgages, liens and encumbrances that the bankrupt's equity of redemption in that property is without value, he may elect not to take it.<sup>22</sup> A court of bankruptcy will not ordinarily order a sale on a petition by the trustee, where the encumbrances equal the value of the property.<sup>23</sup>

<sup>20</sup> In re Dana (C. C. A. 8th Cir.), 167 Fed. 529, 93 C. C. A. 238, 21 Am. B. R. 683.

<sup>21</sup> In re Goldsmith, 168 Fed. Rep.
 779, 21 Am. B. R. 845.

<sup>22</sup> See trustee not bound to take encumbered interest, Sec. 375, ante, and cases cited in the notes.

<sup>28</sup> In re Goldsmith, 118 Fed. Rep.
763, 9 Am. B. R. 419; In re Shaeffer, 105 Fed. Rep. 352, 5 Am. B.
R. 248; In re Cogley, 107 Fed. Rep.
73, 5 Am. B. R. 731; In re Gibbs,
109 Fed. Rep. 627, 6 Am. B. R. 485;
In re Styer, 98 Fed. Rep. 290, 3 Am.
B. R. 424.

It is, however, a question of discretion. The court may order the property turned over to the secured creditor or direct it to be sold by the trustee.<sup>24</sup>

## § 574. Where the trustee redeems the property by discharging encumbrances.

Whenever it may be deemed for the benefit of the estate of a bankrupt to redeem and discharge any mortgage, or other pledge, or deposit, or lien, upon any property, real or personal, or to relieve said property from any conditional contract, and to tender performance of the conditions thereof, or to compound and settle any debts or other claims due or belonging to the estate of the bankrupt, the trustee, or the bankrupt, or any creditor who has proved his debt, may file his petition therefor; and thereupon the court appoints a suitable time and place for the hearing thereof, notice of which must be given as the court shall direct, so that all creditors and other persons interested may appear and show cause, if any they have, why an order should not be passed by the court upon the petition, authorizing such act on the part of the trustee.<sup>25</sup>

The value of securities held by secured creditors is determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors, or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct.<sup>26</sup>

24 Equitable Loan & Security Co.
v. Moss & Co. (C. C. A. 5th Cir.),
125 Fed. Rep. 609, 60 C. C. A. 345,
11 Am. B. R. 111; In re Union
Trust Co. (C. C. A. 1st Cir.), 122
Fed. Rep. 937, 59 C. C. A. 461, 9
Am. B. R. 767.

In re Keet, 128 Fed. Rep. 651, 11 Am. B. R. 117, the court said: "It is not, therefore, a matter of

power, but of discretion; and while, ordinarily, the latter will not be exercised in favor of a sale where the incumbrances equal the value of the property, yet there are considerations in the present instance which seem to make it advisable."

<sup>25</sup> Gen. Ord. 28.

<sup>26</sup> B. A. 1898, Sec. 57h.

The application for redemption of property from a lien is made by petition, which should be in the form prescribed.<sup>27</sup> The petition should be entitled in the court and cause. It should represent that certain portions of the bankrupt's estate, describing the property and its estimated value, are subject to a mortgage or other lien, setting forth or describing the mortgage or lien; and contain an allegation that it is for the benefit of the estate that such property should be redeemed and discharged of the lien. The petition concludes with a prayer that the trustee may be empowered to pay out of the assets of the estate in his hands the amount of the lien in order to redeem the property. The petition is dated and signed by the trustee, bankrupt, or creditor, without verification.

The petition is regularly presented to the referee, who is required to give ten days' notice of the date of the hearing to the creditors of the bankrupt.<sup>29</sup> At the hearing, evidence may be introduced and counsel heard in favor of the petition and in opposition thereto. In consideration thereof, the referee may authorize the trustee to make such payment and redeem the property. If it appears to the referee that it is not for the advantage of the estate to redeem such property he may decline to grant the request to redeem the property.

## § 575. Where the trustee sells subject to liens.

The trustee may be authorized by the judge or referee <sup>30</sup> to sell the interest of the bankrupt in any encumbered property in his possession as part of the estate without affecting the rights of the secured creditor to enforce his lien against the property.<sup>31</sup> In this respect the trustee acts only in the

<sup>&</sup>lt;sup>27</sup> Official Form No. 43; see Form No. 73, post; Gen. Ord. 28.

<sup>28</sup> Gen. Ord. 28.

<sup>&</sup>lt;sup>29</sup> B. A. 1898, Sec. 58a; In re Matthews, 109 Fed. Rep. 603, 6 Am. B. R. 96.

<sup>&</sup>lt;sup>80</sup> In re Fisher & Co., 135 Fed. Rep. 223, 14 Am. B. R. 366; In re Gerry, 112 Fed. Rep. 958, 7 Am. B. R. 459.

<sup>&</sup>lt;sup>81</sup> In re Gerry, 112 Fed. Rep. 958,
7 Am. B. R. 459; Cramer v. Wilson,
195 U. S. 408, 49 L. Ed. 256; In re

interests of the general creditors. It is no part of his duty to make such an application unless he believes the sale will create a larger fund for distribution among the unsecured creditors. He should not make an application for the sale of property which has no market value, or one that is clearly less than the debt secured by the lien.<sup>32</sup>

An application for the sale of such property, subject to a lien, is made by petition, which should be in the prescribed form,<sup>33</sup> and if no mention of liens is made, it will be taken to be a sale subject to liens.<sup>34</sup>

The petition should be entitled in the court and cause. It should describe the estate, or property to be sold, and its estimated value. It should set forth or describe the mortgage or other lien upon the property. It should contain an allegation that the sale would be for the benefit of the estate and that the property should be sold. It should conclude with a prayer that he may be authorized to make the sale of such property subject to the encumbrances thereon. The petition should be signed by the trustee, but need not be verified. The petition is presented to the referee.

The referee should give ten days' notice of the date of the hearing of the petition for such sale by mail to the creditors of the bankrupt.<sup>35</sup> A hearing is had at the time and place named in the notice, at which arguments may be heard in favor and in opposition to the petition and evidence introduced, upon consideration of which the referee may order the property sold at auction or at private sale, and require the trustee to keep an accurate account of the property sold,

Muhlhauser (C. C. A. 6th Cir.), 121 Fed. Rep. 669, 57 C. C. A. 423, 10 Am. B. R. 236.

<sup>32</sup> In re Cogley, 107 Fed. Rep. 73,
5 Am. B. R. 731; In re Goldsmith,
118 Fed. Rep. 763, 9 Am. B. R.
419; In re Shaeffer, 105 Fed. Rep.
352, 5 Am. B. R. 248; In re Gibbs,
109 Fed. Rep. 627, 6 Am. B. R.
485; In re Styer, 98 Fed. Rep. 290,
3 Am. B. R. 424.

33 Official Form No. 44; see Form
 No. 77, post; In re Fisher & Co.,
 135 Fed. Rep. 223, 14 Am. B. R.
 366.

<sup>84</sup> In re Plattesville, 147 Fed.
828, 17 Am. B. R. 291; Ex parte
City of Anderson, 82 S. C. 131, 63
S. E. 354, 62 S. E. 513.

<sup>35</sup> B. A. 1898, Sec. 58a.

the price given therefor, to whom sold, and file the account thereof at once with the referee. If it appears to the referee that nothing is to be gained by the sale he may refuse to grant the prayer of the petition.

#### § 576. Where trustee sells free of liens.

The trustee may also apply for leave to sell encumbered property free from all encumbrances.<sup>36</sup> He may sell it free of a wife's inchoate right of dower with her consent.<sup>37</sup>

The application for such a sale is made by a petition substantially like that prescribed in Form No. 44 for a sale subject to encumbrances, except that the prayer should be that he may be authorized to sell such property free from all encumbrances. The application is regularly made to the referee for leave to sell free of liens.<sup>38</sup> The trustee can not

36 In re Granite City Bank (C. C. A. 8th Cir.), 137 Fed. Rep. 818, 70 C. C. A. 316, 14 Am. B. R. 404; In re Union Trust Co. (C. C. A. 1st Cir.), 122 Fed. Rep. 937, 59 C. C. A. 461, 9 Am. B. R. 967; In re McMahon (C. C. A. 6th Cir.), 147 Fed. Rep. 685, 77 C. C. A. 668, 17 Am. B. R. 530; In re Matthews, 109 Fed. Rep. 603, 6 Am. B. R. 96; In re Goldsmith, 118 Fed. Rep. 763, 9 Am. B. R. 419; In re Rosenberg, 116 Fed. Rep. 402, 8 Am. B. R. 624; Chauncey v. Dyke Bros. (C. C. A. 8th Cir.), 119 Fed. Rep. 1, 55 C. C. A. 579, 9 Am. B. R. 444; Carroll Co. v. Young (C. C. A. 3d Cir.), 119 Fed. Rep. 576, 56 C. C. A. 380, 9 Am. B. R. 643; In re Sanborn, 96 Fed. Rep. 551, 3 Am. B. R. 54; In re Waterloo Organ Co., 118 Fed. Rep. 904, 9 Am. B. R. 427; In re Keet, 128 Fed. Rep. 651, 11 Am. B. R. 117; Blair v. Carter, 78 Va. 621 (under the act of 1867).

<sup>37</sup> In Savage v. Savage (C. C. A.
 4th Cir.), 141 Fed. Rep. 346, 72

C. C. A. 494, 15 Am. B. R. 599, the court said: "It is nearly always desirable, in making sale of a bankrupt's real estate, if the wife will consent, to sell free from her inchoate right of dower, and to compensate her by a fair allowance out of the proceeds for her release of that right. It is common practice to do so when it is possible, and we think the practice is to be approved, as it gives the purchaser an unincumbered title, and ordinarily results in advantage to creditors by obtaining a better price for a clear title than can be obtained for property the title to which is clouded by such a possible incumbrance." See also In re Keet, 128 Fed. Rep. 651, 11 Am. B. R. 117.

38 In re Fisher & Co., 135 Fed.
Rep. 223, 14 Am. B. R. 366; In re Matthews, 109 Fed. Rep. 603, 6 Am. B. R. 96; In re Goldsmith, 118 Fed. Rep. 763, 9 Am. B. R. 419; In re Rosenberg, 116 Fed. Rep. 402, 8 Am. B. R. 624.

so sell without an order of court,<sup>39</sup> which should be granted when for the best interest of the estate,<sup>40</sup> and when not prejudicial to the lienors,<sup>41</sup> and may be given before determining the validity or amount of the liens.<sup>42</sup>

A ten days' notice should be given the general creditors.<sup>43</sup> The rights of the secured creditors being affected by the sale, they must likewise have notice to appear and protect their interests.<sup>44</sup> The notice prescribed by section 58a of the bankrupt act is sufficient to bring in secured creditors.<sup>46</sup> This notice may be served personally on the creditor and proof of such service made by affidavit. The record must show affirmatively that every creditor whose lien will be discharged by the sale has received notice of the application to sell.<sup>47</sup> A general statement by the referee that such notice "was given to each and every creditor and lien creditor" is not sufficient.

The trustee may be directed to sell such property at public auction or at private sale. When the sale is made, the lien is transferred to the fund in court.<sup>48</sup>

<sup>39</sup> Boulware v. Hartsook, 83 Va. 679, 3 S. E. 289.

<sup>40</sup> In re United States Graphite Co., 161 Fed. Rep. 583, 20 Am. B. R. 573, to avoid dismembering property.

41 In re Alden, 16.Am. B. R. 362 (Referee).

<sup>42</sup> In re Littlefield (C. C. A. 1st Cir.), 155 F. 838, 84 C. C. A. 72, 19 Am. B. R. 18.

<sup>43</sup> B. A. 1898, Sec. 58a.

44 In re Plattesville Foundry & Machine Co., 147 Fed. Rep. 828; In re Sanborn, 96 Fed. Rep. 551, 3 Am. B. R. 54; In re Goldsmith, 118 Fed. Rep. 763, 9 Am. B. R. 419; Ray v. Norseworthy, 23 Wall. 128, 23 L. Ed. 116; Houston v. City Bank, 6 How. 486, 12 L. Ed. 526; Fowler v. Hart, 13 How. 373, 14 L. Ed. 186. United Sheet & Tin Plate Co. v. Hess (C. C. A. 6th Cir.), 159 Fed. 889, 87 C. C. A. 69, 20 A. B. R.

254; In re Kohl-Hepp Brick Co. (C. C. A. 2d Cir.), 176 Fed. 340, 100 C. C. A. 269, 23 Am. B. R. 822; Blood v. Munn, 155 Cal. 228 100 P. 694.

If a mortgagee was present at the trustee's sale and bid at it he is estopped from claiming that he had no notice of the sale, and if he failed to object to the sale and ask a separation, he lost his lien. *In re* Caldwell, 178 Fed. Rep. 377, 24 Am. B. R. 495.

46 In re Granite City Bank (C. C. A. 8th Cir.), 137 Fed. Rep. 818, 70 C. C. A. 316, 14 Am. B. R. 404; In re Wilka, 131 Fed. Rep. 1004, 12 Am. B. R. 727.

<sup>47</sup> In re Saxton Furnace Co., 136 Fed. Rep. 697, 14 Am. B. R. 483.

<sup>48</sup> In re Kohl-Hepp Brick Co. (C. C. A. 2d Cir.), 176 Fed. Rep. 340, 100 C. C. A. 269, 23 Am. B. R. 822;

The bankruptcy court having sold the property free from liens and the liens having attached to the funds in the court's custody, the bankruptcy court will decide the rights of the different lien claimants,<sup>49</sup> and may call the claimants in by either notice or rule to show cause.<sup>50</sup> The mortgages and other liens must be paid out of the fund obtained from the sale before it is applied to the payment of other debts, even the debts which are given priority by the statute.<sup>51</sup>

In re Worland, 92 Fed. Rep. 893, 1 Am. B. R. 450; In re Pittelkow, 92 Fed. Rep. 901, 1 Am. B. R. 472; Southern L. & T. Co. v. Benbow, 96 Fed. Rep. 514, 3 Am. B. R. 9; In re Granite City Bank (C. C. A. 8th Cir.), 137 Fed. Rep. 818, 70 C. C. A. 316, 14 Am. B. R. 404; Carroll & Bros. Co. v. Young (C. C. A. 3d Cir.), 119 Fed. Rep. 576, 56 C. C. A. 380, 9 Am. B. R. 643. In First National Bank v. Trust Co., 198 U. S. 291, 49 L. Ed. 1051,

In First National Bank v. Trust Co., 198 U. S. 291, 49 L. Ed. 1051, 14 Am. B. R. 102, the supreme court said: "The sale in the circumstances did not change the situation. The proceeds stood in place of the property and the order returning the proceeds was equivalent to an order returning the property. This was proper to do, whether the court had held that it lacked jurisdiction, or ruled in favor of petitioners on the merits."

<sup>49</sup> Whitney v. Wenman, 198 U. S. 539, 49 L. Ed. 1157, 14 Am. B. R. 45; In re Waterloo Organ Co., 118 Fed. Rep. 904, 9 Am. B. R. 427; Chauncey v. Dyke Bros. (C. C. A. 8th Cir.), 119 Fed. Rep. 1, 55 C. C. A. 579, 9 Am. B. R. 444; In re Byrne, 97 Fed. Rep. 762, 3 Am. B. R. 268; In re Miners' Brewing Co., 162 Fed. Rep. 327, 20 Am. B. R. 717.

In re Rochford (C. C. A. 8th Cir.), 124 Fed. Rep. 182, 59 C. C.

A. 388, 10 Am. B. R. 608, the court said: "The only question here presented is whether or not the referee and the court had jurisdiction to determine the validity of the claim of the mortgagee to the property or its proceeds. sale was valid. The court lawfully acquired and rightfully held the custody of the property. The conversion of it into money by the sale was a rightful proceeding in bank-The issue of the notice to the mortgagee to present his claim to the court and the adjudication of it were far within the jurisdiction of the referee and of the court below."

<sup>50</sup> In re Rochford (C. C. A. 8th Cir.), 124 Fed. Rep. 182, 59 C. C. A. 388, 10 Am. B. R. 608.

61 In re Prince and Walter, 131 Fed. Rep. 546, 12 Am. B. R. 675; In re Frick, 1 Am. B. R. 719; In re McConnell, No. 8712 Fed. Cas., 9 N. B. R. 387; but see In re Tebo, 101 Fed. Rep. 419, 4 Am. B. R. 235; see also post, Sec. 594.

In re Vogt, 163 Fed. Rep. 551, 20 Am. B. R. 457. (Where chattel mortgage property is sold free from liens a motion by the trustee to have the funds turned over to him must be denied until the rights of the mortgagee to the same have been adjudicated. Funds still held by receiver in bankruptcy.)

The liens may take priority over the expenses of the sale itself where the lienors have in no way assented to the sale.<sup>52</sup>

The court has said in a recent case: "A court of bankruptcy should not assume charge of encumbered property and liquidate the liens on it, unless there are reasonable grounds for believing some advantage will accrue to the bankrupt's estate. If the validity of the liens is unquestioned, and their amount is such that there is probably no excess of value in the property, it should be surrendered to the lienholders or ' others entitled, unless some other reason appears for retaining control. A court of bankruptcy is not a court of general. jurisdiction for the adjudication of controversies or the administration of assets in which the bankrupt's estate is in nowise interested. If, however, cognizance is taken, it should be assumed some benefit or advantage was expected to accrue to the general creditors, and if it results otherwise it is equitable to make the general estate bear the cost of the proceeding. Here the proceeds of the sale did not equal the admitted encumbrance, and the deficiency should not be further increased by deducting the commissions of the officers, if there is a general estate against which they can be charged." 58

It is not necessary for the lien claimant to prove his claims before he can subject the property or its proceeds to his debt, 55 nor is it necessary for him in any way to object to the sale if his proportional share of the proceeds can be determined. 56

52 In re Allert, 173 Fed. Rep. 691, 23 Am. B. R. 101. See however McNair v. McIntyre (C. C. A. 4th Cir.), 113 Fed. Rep. 113, 51 C. C. A. 89, 7 Am. B. R. 638, affirming In re Sanderlin, 109 Fed. Rep. 857, 6 Am. B. R. 384; In re Utt (C. C. A. 7th Cir.), 105 Fed. Rep. 754, 45 C. C. A. 32, 5 Am. B. R. 383. Cf. Sec. 599, supra, where it appears that the expenses of preserving property may take precedence over liens.

<sup>58</sup> In re Harralson (C. C. A. 8th Cir.), 179 Fed. Rep. 490, 103 C. C. A. 70, 24 Am, B. R. 715.

<sup>55</sup> In re Goldsmith, 118 Fed. Rep. 763, 9 Am. B. R. 419; In re Oconee Milling Co. (C. C. A. 5th Cir.), 109 Fed. Rep. 866, 48 C. C. A. 703, 6 Am. B. R. 475.

<sup>56</sup> Carroll Co. v. Young (C. C. A.
3d Cir.), 119 Fed. Rep. 576, 56
C. C. A. 380, 9 Am. B. R. 643.
See also Keyser v. Wessel (C. C.

Where the entire property is sold without any objection from a creditor who has a lien on a portion of it, he can not enforce his lien against the proceeds; he should make his claim before the sale and have the goods on which he has a lien sold separately.<sup>57</sup> The purchaser should be protected from being forced to pay taxes which though not yet levied have become a lien at the time of the sale.<sup>58</sup> Where the lien claimant is the purchaser, if the amount and validity of his lien is unquestioned, he should be allowed to deduct it from the purchase price; if the lien is doubtful he should pay the difference between the amount of the lien as claimed and the purchase and give the trustee an undertaking to pay the balance if it is decided against him.<sup>59</sup>

Where a secured creditor has received money on his claim by order of the referee, he is entitled to retain it until the order is vacated by a direct proceeding for that purpose.<sup>60</sup>

#### § 577. Trustee's right to sell pledge.

The trustee may sell the interest of the bankrupt in the property pledged by direction of the court without making the pledgee a party. In such case the property is conveyed subject to the claim of the pledgee:

The trustee may, under order of court, sell the property free from the lien of the pledgee. The trustee can not compel a sale of this character without the consent of the pledgee, because the property is in the possession of the pledgee and the statute does not provide for bringing in parties to determine controversies of this kind, where the property is not in the custody of the court. The pledgee

A. 3d Cir.), 128 Fed. Rep. 281, 62 C. C. A. 650, 12 Am. B. R. 126. <sup>57</sup> In re Klapholz, 113 Fed. Rep. 1002, 7 Am. B. R. 703; In re Gerry, 112 Fed. Rep. 958, 7 Am. B. R. 459; Keyser v. Wessel (C. C. A. 3d Cir.), 128 Fed. Rep. 281, 62 C. C. A. 650, 12 Am. B. R. 126. <sup>68</sup> In re Keller, 109 Fed. Rep. 131,

6 Am. B. R. 351. See Sec. 589, post.

<sup>59</sup> In re Waterloo Organ Co., 118 Fed. Rep. 904, 9 Am. B. R. 427.

60 In re Wilkesbarre Furniture Mfg. Co., 130 Fed. Rep. 796, 12 Am. B. R. 472.

<sup>61</sup> Yeatman v. Savings Institution, 95 U. S. 764, 768; 24 L. Ed. 589.

may consent. In that case proceedings to sell property may be instituted by a petition by the trustee for leave to sell the pledge at private or public sale, the pledgee consenting. The fund will stand for the property. A rule to show cause why the sale should not be had is issued by the court to the creditors, giving them ten days' notice of the hearing. An order directing the trustee to make such sale is then entered and the sale made by the trustee co-operating with the pledgee. The sale is then confirmed by the court and the money distributed as in other cases.

The pledgee may proceed upon default to sell the pledge in the usual way, although the pledgor may have been adjudged a bankrupt, 62 and the court will not interfere with a pledgee selling a thing pledged, under the power of sale given by the terms of his contract, when there is no claim that such power is exercised in a fraudulent or oppressive manner. 63 Notice of such sale should ordinarily be given to the trustee, provided he has been appointed before the sale. The pledgee may rely wholly upon his security and refuse to prove his claim in the bankruptcy court. In such a case he loses only the privilege in participating in the distribution of the bankrupt's estate. He may surrender his preference and prove his claim as an unsecured creditor. 64

## § 578. Lien o fsecured creditor.

Where the property is sold subject to liens, the purchaser takes only the bankrupt's interest in the property, whatever that may be, and the secured creditor's lien on the property is preserved.<sup>65</sup> Where it is sold free of liens, the secured

62 Hiscock v. Varick Bank, 206
U. S. 28, 51 L. Ed. 945, 18 Am. B.
R. 1. Jerome v. McCarter, 94 U. S.
734, 27 L. Ed. 136; In re Browne,
104 Fed. Rep. 762, 5 Am. B. R.
220; In re Mertens (C. C. A. 2d
Cir.), 144 Fed. Rep. 819, 75 C. C.
A. 548, 15 Am. B. R. 362.

63 Hiscock v. Varick Bank, 206
 U. S. 28, 51 L. Ed. 945, 18 Am. B.
 R. 1. In re Browne, 104 Fed. Rep.

762, 5 Am. B. R. 220; In re Mertens (C. C. A. 2d Cir.), 144 Fed. Rep. 818, 75 C. C. A. 548, 15 Am. B. R. 362; reversing 134 Fed. Rep. 101, 14 Am. B. R. 226.

64 B. A. 1898, Sec. 57g.

65 Cramer v. Wilson, 195 U. S. 408, 49 L. Ed. 256; In re Muhlhauser (C. C. A. 6th Cir.), 121 Fed. Rep. 669, 57 C. C. A. 423, 10 Am. B. R. 236.

creditor can assert his right to the proceeds before the referee after the sale, when and where his claim can be heard and its priority awarded.<sup>66</sup> The purchaser takes a clear title to the property.

Where a secured creditor buys at trustee's sale he need not pay the whole purchase price to the trustee, but is entitled to have it credited on his allowed claim.<sup>67</sup>

# § 579. When a secured creditor may apply to have property, on which he has a lien, sold.

The trustee may not see fit to institute proceedings for the sale of encumbered property. Whenever he does not, the secured creditor must do so, if it is to be sold in the court of bankruptcy.

Since all the property of the bankrupt passes to the trustee, as has been pointed out elsewhere, subject to equities, property on which there is a mortgage or other lien passes to the trustee, and is therefore in the custody of the court of bankruptcy. This rule is subject to an exception in case the trustee elects not to take encumbered property. In case the trustee elects not to take the encumbered property, it releases the jurisdiction of the bankruptcy court over such property, and the secured creditor may proceed to enforce his lien in a state court.

66 In re Rochford (C. C. A. 8th Cir.), 124 Fed. Rep. 182, 59 C. C. A. 388, 10 Am. B. R. 608; In re Granite City Bank (C. C. A. 8th Cir.), 137 Fed. Rep. 818, 70 C. C. A. 316, 14 Am. B. R. 404; In re Union Trust Co. (C. C. A. 1st Cir.), 122 Fed. Rep. 937, 59 C. C. A. 461, 9 Am. B. R. 767.

67 *In re* Harralson, (C. C. A. 8th Cir.), 179 Fed. 490, 103 C. C. A. 70, 24 Am. B. R. 715.

68 In re Kellogg (C. C. A. 2d Cir.), 121 Fed. Rep. 333, 57 C. C.

A. 547, 10 Am. B. R. 7; In re Rochford (C. C. A. 8th Cir.), 124 Fed. Rep. 182, 59 C. C. A. 388, 10 Am. B. R. 608; Chauncey v. Dyke Bros (C. C. A. 8th Cir.), 119 Fed. Rep. 1, 55 C. C. A. 579, 9 Am. B. R. 444; In re Kellogg, 6 Am. B. R. 389; Carter v. Hobbs, 92 Fed. Rep. 594, 1 Am. B. R. 215: In re Worland, 92 Fed. Rep. 893, 1 Am. B. R. 450; In re Pittelkow, 92 Fed. Rep. 901, 1 Am. B. R. 472; In re Booth, 96 Fed. Rep. 943, 2 Am. B. R. 770.

An attempt to enforce a lien in any other court is liable to be enjoined.<sup>69</sup> A sale so made may be set aside.<sup>70</sup> The court of bankruptcy may permit or authorize a secured creditor to enforce his security in a state court.<sup>71</sup>

In such case the trustee must be a party to the proceeding.<sup>73</sup> Such a proceeding in a state court, without authority, is not absolutely void.<sup>74</sup> The court of bankruptcy will not interfere with such proceedings unless an advantage may result to the bankrupt estate.<sup>75</sup> It may ratify the state proceedings

69 In re Utt (C. C. A. 7th Cir.), 105 Fed. Rep. 754, 45 C. C. A. 32, 5 Am. B. R. 383; In re Matthews, 109 Fed. Rep. 603, 6 Am. B. R. 96; In re Pittelkow, 92 Fed. Rep. 901, 1 Am. B. R. 472; In re Globe Cycle Works (Ref.), 2 Am. B. R. 447; Markson v. Heaney, No. 9098 Fed. Cas., 1 Dill. 497; McLean v. Lafayette Bank, No. 8885 Fed. Cas., 3 McLean, 185; In re Kerosene Oil Co., No. 7725 Fed. Cas., 3 Ben. 35; In re Wynne, No. 18117 Fed. Cas., Chase, 227.

See Clifton v. Foster, 103 Mass. 233.

<sup>70</sup> In re Davis, No. 3618 Fed. Cas., 2 N. B. R. 391; Davis v. Anderson, No. 3623 Fed. Cas., 6 N. B. R. 145.

<sup>11</sup> In re Porter, 109 Fed. Rep. 111, 6 Am. B. R. 259; Equitable Loan & Security Co. v. Moss & Co. (C. C. A. 5th Cir.), 125 Fed. Rep. 609, 60 C. C. A. 345, 11 Am. B. R. 111; In re Cook, No. 3151 Fed. Cas., 3 Biss. 116; In re McGilton, No. 8798 Fed. Cas., 3 Biss. 144.

The court refused to enjoin a sale of the property of the bankrupt by a receiver appointed in equity, where a large majority of the creditors desired the sale to go on, and the only reason for postponing it was that a

few of the creditors desired time to prove that the corporation had committed an act of bankruptcy and where extensive advertising had already been done, and it was apparent that on a delay of the sale less would be realized than on the sale as advertised. *In re* Edward Ellsworth Co., 173 Fed. Rep. 699, 23 Am. B. R. 284.

<sup>78</sup> Cole v. Duncan, 58 III. 176; Truitt v. Truitt, 38 Ind. 16; Winslow v. Clark, 47 N. Y. 261; Barron v. Newberry, No. 1056 Fed. Cas., 1 Biss. 149.

74 Whitridge v. Taylor, 66 N. C.
273; Truitt v. Truitt, 38 Ind. 16;
Pierce v. Wilcox, 40 Ind. 70; Cole v. Duncan, 58 Ill. 176; Mays v.
Fritton, 20 Wall. 414, 22 L. Ed. 389; Scott v. Kelly, 22 Wall. 57, 22 L. Ed. 729; Boese v. King, 108 U. S. 379, 27 L. Ed. 760.

75 In re Utt (C. C. A. 7th Cir.), 105 Fed. Rep. 754, 45 C. C. A. 32, 5 Am. B. R. 383; In re Holloway, 93 Fed. Rep. 638, 1 Am. B. R. 659; In re Brinkman, No. 1883 Fed. Cas., 6 N. B. R. 541; In re Bowie, No. 1728 Fed. Cas., 1 N. B. R. 628; In re Tron Mountain Co., No. 7065 Fed. Cas., 9 Blatch. 320; Tichenor v. Allen, 13 Grat. (Va.) 15.

upon application where the secured creditor shows that the estate and the other creditors will not be injured thereby. The secured creditor may surrender his security or rely upon his security without proving his claim, 77 or if the entire debt is not secured, he may rely upon his security and prove for the balance. 78

Whenever a secured creditor desires to enforce his mortgage or other lien in a court of bankruptcy, he may file an intervening petition asking that the trustee administer the property in the bankruptcy proceedings. This petition should be filed by leave of court. It is not necessary for him to first prove his claim. 79 If he does not prove his claim, he is not entitled to a dividend on any part of the debt not covered by the security. He can not demand as a matter of right that the court of bankruptcy enforce his security. It is purely a matter of judicial discretion. If it appears that the encumbrance is equal to the value of the property, the court will not, ordinarily, undertake to enforce the security.80 It is, however, sometimes convenient in the settlement of an estate to have such property sold by the trustee. In case it appears, for any reason, to be for the best interests of the general creditors, the court may order property encumbered to its full value to be sold by the trustee.81

A secured creditor may obtain a sale of property securing his debt in a court of bankruptcy by first proving his claim

<sup>76</sup> Phelps v. Sellick, No. 11079 Fed. Cas., 6 N. B. R. 390.

77 In re Goldsmith, 118 Fed. Rep. 763, 9 Am. B. R. 419.

78 See rights of secured creditors, Sec. 338, ante; B. A. 1898, Sec. 56b and Sec. 57h; Wicks v. Perkins, No. 17615 Fed. Cas., 1 Woods, 383; Brown v. Gibbons, 37 Ia. 654; McKay v. Funk, 37 Ia. 661; Bentley v. Wells, 61 Ill. 59.

<sup>79</sup> In re Goldsmith, 118 Fed. Rep. 763, 9 Am. B. R. 419.

80 In re Goldsmith, 118 Fed. Rep.

763, 9 Am. B. R. 419; In re Shaeffer, 105 Fed. Rep. 352, 5 Am. B. R. 248; In re Cogley, 107 Fed. Rep. 73, 5 Am. B. R. 731; In re Gibbs, 109 Fed. Rep. 627, 6 Am. B. R. 485; In re Styer, 98 Fed. Rep. 290, 3 Am. B. R. 424.

81 In re Keet, 128 Fed. Rep. 651, 11 Am. B. R. 117; In re Utt (C. C. A. 7th Cir.), 105 Fed. Rep. 754, 45 C. C. A. 32, 5 Am. B. R. 383; In re Union Trust Co. (C. C. A. 1st Cir.), 122 Fed. Rep. 937, 59 C. C. A. 461, 9 Am. B. R. 767.

in the manner prescribed.<sup>82</sup> In such case he is entitled to a dividend on such sum as may be owing over and above the value of his security.<sup>83</sup> Either his security or his debt may be disputed. The contest is made upon the proof of the debt in the same manner as contests upon the proof of unsecured debts.<sup>84</sup> If his claim is allowed, the property will regularly be sold upon application. The object of selling such property is to ascertain the value of the security.

It is not always necessary to resort to a sale for this purpose. The value of a security held by a secured creditor may be determined by converting the same into money according to the terms of the agreement pursuant to which such security was delivered to such creditor, by such creditor, and the trustee, by agreement, arbitration, or compromise, as well as by litigation.<sup>85</sup> Whichever method is resorted to for this purpose is subject to the direction of the court.

The selling of such property is a matter of judicial discretion. The court will take a course which, in its judgment, having due reference to the rights of the secured creditors, will be most beneficial to all the parties interested. A secured creditor can not demand, as a matter of right, that the trustee shall, upon his offer, convey the property, upon which he has a lien, to him on condition of his agreeing not to present a claim for any part of the debt against the estate.<sup>86</sup>

Where a secured creditor seeks and enjoys the aid of the bankruptcy court in enforcing and releasing his liens, he should pay the costs incurred in obtaining this aid.<sup>87</sup> The

5 Am. B. R. 383; In re Alison Rubber Co., 137 Fed. Rep. 643, 14 Am. B. R. 78; In re Cogley, 107 Fed. Rep. 73, 5 Am. B. R. 731; McNair v. McIntyre (C. C. A. 4th Cir.), 113 Fed. Rep. 113, 51 C. C. A, 89, 7 Am. B. R. 638; In re Goldsmith, 118 Fed. Rep. 763, 9 Am. B. R. 419.

<sup>82</sup> Official Forms No. 32 and No.
36; see Forms Nos. 55 and 59, post.
83 B. A. 1898, Sec. 57e.

<sup>&</sup>lt;sup>84</sup> See re-examination of claims, Sec. 349, ante.

<sup>85</sup> B. A. 1898, Sec. 57h.

<sup>86</sup> In re Ellerhorst, No. 4380 Fed. Cas., 2 Saw. 219.

<sup>&</sup>lt;sup>87</sup> In re Utt (C. C. A. 7th Cir.), 105 Fed. Rep. 734, 45 C. C. A. 32,

referee and trustee are entitled to commissions on all moneys dispersed to a secured creditor by the trustee.<sup>88</sup>

#### § 580. Disputed property.

Under the general power conferred upon the court of bankruptcy with reference to collecting, reducing to money and distributing the estates of bankrupts, and determining controversies in relation thereto,<sup>89</sup> the court may order property, which is in dispute, sold. The title to a part of the real or personal property which comes into possession of the trustee or which is claimed by him may be in dispute. It may be for the advantage of all concerned that such property be sold, and the fund deposited in court until the court of bankruptcy shall determine to whom it belongs.

Where the property is in the possession of the trustee, or the claimant is a party to the bankruptcy proceedings, he may sell it under the direction of the court without the consent of the claimant, but where the property is in the possession of the claimant he must procure his consent or resort to a suit in a court of competent jurisdiction to recover it.<sup>90</sup>

The court has jurisdiction with the consent of the adverse claimant to authorize its receiver, though out of possession to consent to a sale of the property in the interests of its preservation. The only difficulty in principle of doing this, is the possession of the adverse party, and that difficulty is removed by his consent which it would be a contempt for him subsequently to revoke.<sup>91</sup>

88 B. A. 1898, Secs. 40 and 48 as amended by the act of February 5, 1903, 32 Stat. at L. 797. In re Sanford Furniture Mfg. Co., 126 Fed. Rep. 888, 11 Am. B. R. 414; In re Iowa Falls Mfg. Co., 140 Fed. Rep. 527, 15 Am. B. R. 384.

<sup>99</sup> B. A. 1898, Sec. 2, clause 7.
<sup>90</sup> In re Rosenberg, 116 Fed. Rep.
402, 8 Am. B. R. 624; In re First
Nat. Bank v. Title & Trust Co., 198

U. S. 280, 49 L. Ed. 1051, 14 Am. B. R. 102; In re McMahon (C. C. A. 6th Cir.), 147 Fed. Rep. 685, 77 C. C. A. 668, 17 Am. B. R. 530. See In re Gorwood, 138 Fed. Rep. 844, 15 Am. B. R. 107, where the court refused to sell separately a house erected by the bankrupt on leased property.

<sup>91</sup> Ommen v. Talcott, 175 Fed. Rep. 261; 23 Am. B. R. 570. In case the property is in his possession the trustee should petition the judge or referee for leave to make such sale. Ten days' notice should be given to the creditors. Notice should also be given to the claimant to appear and assert his right in the property. In practice, sales of this character can usually be arranged by agreement.

### § 581. Sale of perishable property.

Upon petition by a bankrupt, creditor, receiver or trustee, setting forth that a part or the whole of the bankrupt's estate is perishable, the nature and location of such perishable estate, and that there will be loss if the same is not sold immediately, the court, if satisfied of the facts stated, and that the sale is required in the interest of the estate, may order the same to be sold, with or without notice to the creditors, and the proceeds to be deposited in court, 93 or distributed where the petition in bankruptcy is subsequently dismissed. 94

The petition and order should be in the prescribed form.<sup>95</sup> Where a sale of perishable property is confirmed by the

<sup>92</sup> B. A. 1898, Sec. 58a, as amended June 25, 1910.

93 Gen Ord. 18, par. 3. See also In re Becker, 98 Fed. Rep. 407, 3 Am. B. R. 412; In re Edes; 135 Fed. Rep. 595, 14 Am. B. R. 382; In re Le Vay, 125 Fed. Rep. 990, 11 Am. B. R. 114; In re Joyce, 128 Fed. Rep. 985, 11 Am. B. R. 716; In re B. D. Barner & Co., 153 Fed. 914, 18 Am. B. R. 733, by temporary receiver; In re Roberts (C. C. A. 7th Cir.), 166 Fed. 96, 92 C. C. A. 80, 21 Am. B; R. 573. (Order of sale "to sell at public or private sale and within his" [receiver's] "discretion at current rates without notice" was broad enough to justify sale in bulk of perishable property.) '

94 Where the court on the face of a voluntary petition has apparent jurisdiction to make an adjudication and appoints a receiver who sells perishable property, the fact that the petition is subsequently dismissed does not deprive the court of power to preserve the property and transfer it into money and charge against the fund the expenses of so doing. The character of the bankrupt court as a court of equity requires it to pay the money over to such creditors as are entitled to it, and not simply to return it to the alleged bankrupt. In re De Lancey Stables Co., 170 Fed. Rep. 860, 22 Am. B. R. 406.

95 Official Form No. 46; see Form No. 84, post. Order to sell property will be set aside when upon a

court it is not necessary to state the grounds on which the property taken as a whole was considered to be in the nature of perishable property.<sup>96</sup>

The property must be perishable in the sense that it is physically deteriorating to justify such a sale.<sup>97</sup>

petition that simply alleges that costs and expenses of keeping the property would be accumulated if no sale and does not show that property will depreciate. *In re* Harris, 156 Fed. 875, 19 Am. B. R. 635.

96 Rogers v. Abbott, 206 Mass.
 270, 92 N. E. 472.

97 A stock of hardware can not be sold without notice to creditors as perishable property, although by delay it is becoming unseasonable. In re C. F. Beutel's Son's Co., 7 Am. B. R. 768 (referee decision). A sale of buildings rapidly deteriorating and to prevent absolute loss may be considered a sale of perishable property under G. O. 18. In re Milne Mfg. Co., 21 Am. B. R. 468 (referee).

#### CHAPTER XXIX.

#### PRIORITIES ON DISTRIBUTION.

SEC.		SEC.	
582.	The general scheme of distribution.	590.	Costs of administration.
583.	Secured creditors paid before those		Attorney's fees.
	having priority under section 64.	592.	Wages or labor claims.
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585.	Claim, estoppel or waiver of prior-	594.	Debts entitled to priority under
	ity.		the laws of the states or United
586.	Taxes.		States.
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588.	Costs of preserving estate.		States.
589.	Filing fees and expenses of recover-		
588.	Costs of preserving estate.	333.	

#### § 582. The general scheme of distribution.

ing property.

The order of payment of claims against a bankrupt is as follows:

First. The claims of secured creditors to the extent of their security.<sup>1</sup>

Second. Debts which are given priority of payment by virtue of the express provision of section 64 in the following order; <sup>2</sup> First. Costs of preserving the estate subsequent to filing the petition. Second. Filing fees paid by creditors in involuntary cases, and the reasonable expense of creditors in recovering property transferred or concealed by the bankrupt. Third. Cost of administration. Fourth. Wages due workmen, etc. Fifth. Debts entitled to priority under the laws of the states or of the United States, and no other debts are entitled to priority.

Third. Taxes due by the bankrupt 3 and,

Fourth. The claims of the unsecured or general creditors. In the event of the confirmation of a composition being set aside, or a discharge revoked, the property acquired by

<sup>1</sup> See Sec. 583, post.

<sup>&</sup>lt;sup>2</sup> B. A. 1898, Sec. 64, as amended Feb. 5, 1903, 32 Stat. at L. 797.

<sup>3</sup> See Sec. 587, post.

the bankrupt in addition to his estate at the time the composition was confirmed or the adjudication was made, is applied to the payment in full of the claims of creditors for property sold to him on credit, in good faith, while such composition or discharge was in force, and the residue, if any, is applied to the payment of the debts which were owing at the time of the adjudication.<sup>4</sup>

When the referee has determined what debts are entitled to priority he should pass an order setting forth the names of the creditors and the amount of debts entitled to priority due each, and direct the trustee to pay such debts in full.

Where the bankruptcy court acquires jurisdiction during the life of the bankrupt the estate must be distributed under that law and his death pending proceedings does not render the state law as to the distribution of the estates of deceased persons applicable.<sup>5</sup>

The court can not adjudicate priority to a creditor on a proceeding for proof of his claim where no such issues have been formulated or presented as to enable the court properly to hear and determine the rights of the parties.<sup>6</sup>

## § 583. Secured creditors paid before those having priority under section 64.

A secured creditor, as a mortgagee or lienholder, is entitled to be paid in full, or to the extent of the amount realized from the funds derived from a sale of the property which is subject to the specific lien or security before a creditor having priority under section 64b is paid.<sup>1</sup>

- <sup>4</sup> B. A. 1898, Sec. 64c.
- <sup>5</sup> In re Devlin, 180 Fed. Rep. 170, 24 Am. B. R. 863.
- <sup>6</sup> Davis v. Louisville Trust Co. (C. C. A. 6th Cir.), 181 Fed. Rep. 10, 109 C. C. A. —, 25 Am. B. R. 621.
- <sup>1</sup> In re Proudfoot, 173 Fed. Rep. 733, 23 Am. B. R. 106; In re Prince & Walter, 131 Fed. Rep. 546, 12 Am. B. R. 675; In re Yoke Vitrified Brick Co., 180 Fed. Rep. 235,

25 Am. B. R. 18; In re Erie Lumber Co., 150 Fed. Rep. 817, 17 Am. B. R. 689; In re City Trust Co. (C. C. A. 6th Cir.), 121 Fed. Rep. 706, 58 C. C. A. 126, 10 Am. B. R. 231; In re Bourlier Cornice Roofing Co., 133 Fed. Rep. 958, 13 Am. B. R. 585; In re McConnell, No. 8712 Fed. Cas., 9 N. B. R. 387.

But see *In re* Tebo, 101 Fed. Rep. 419, 4 Am. B. R. 235.

The priority referred to under section 64 relates to claims otherwise unsecured and gives them priority over unsecured claims, before those not affected by a debt or claim secured by mortgage or other lien, which the act expressly provides shall not be affected by bankruptcy proceedings.<sup>2</sup>

It will be observed that this priority is only allowed out of the estate of the bankrupt. The fund derived from the sale of property, which is subject to specific liens, becomes a part of the bankrupt's estate to such extent only as the fund exceeds the amount of the debt secured by the lien or mortgage.<sup>3</sup> Claims are entitled to priority only out of the estate of the bankrupt which remains after the satisfaction of the debts duly secured by liens existing at the time the bankruptcy proceedings are instituted.

## § 584. Interest and expenses on secured claims.

If the security exceeds the debt, the creditor is entitled to be paid in full including interest until settlement with the trustee, whether by redemption, sale or otherwise.<sup>4</sup>

Where the debt exceeds the security sold after bankruptcy, the creditors must apply the proceeds, other than interest and dividends accruing since the date of the petition, first, to the liquidation of the debt with interest to the date of the petition. He can not first apply such proceeds to the interest accrued since bankruptcy, but he may apply interest and dividends accruing on securities after the date of the petition to interest on the debt accruing after that date. It has been

<sup>2</sup> B. A. 1898, Sec. 67a; In re Vulcan Foundry & Mach. Co. (C. C. A. 3d Cir.), 180 Fed. Rep. 671, 103 C. C. A. 637, 24 Am. B. R. 825; In re Allert, 173 Fed. Rep. 691, 23 Am. B. R. 101; In re Proudfoot, 173 Fed. Rep. 733, 23 Am. B. R. 106.

<sup>3</sup> As to the title of the trustee, see Sec. 371, ante.

<sup>4</sup> In re Industrial Cold Storage & Ice Co., 163 Fed. Rep. 390, 20 Am. B. R. 904; Coder v. Arts (C. C. A. 8th Cir.), 152 Fed. Rep. 943, 950,

82 C. C. A. 91, 18 Am. B. R. 513; In re Stevens, 173 Fed. Rep. 842, 23 Am. B. R. 239; In re Allert, 173 Fed. Rep. 691, 23 Am. B. R. 101; Ex parte Martin, 2 Rose, 87; Ashwell v. Stanton, 30 Beav. 52.

<sup>6</sup> Sexton v. Dreyfus, 219 U. S. 339,
54 L. Ed. —; Coder v. Arts (C. C. A. 8th Cir.), 152 Fed. Rep. 943, 950,
82 C. C. A. 91, 18 Am. B. R. 513.

<sup>6</sup> Sexton v. Dreyfus, 219 U. S. 339, 54 L. Ed. —; Ex parte Penfold, De Gex, S. & M. 282; Ex parte

held that a secured creditor was entitled to the rents and profits derived by the trustee from the mortgaged property while it was in his possession.<sup>7</sup>

Where a creditor uses the machinery of the bankruptcy court for the purpose of enforcing a security, he is chargeable with the expenses incident to the foreclosure of his mortgage or other lien,<sup>8</sup> including the commissions of the referee and trustee.<sup>9</sup>

A secured creditor is not chargeable with the general expenses of administration, <sup>10</sup> or with expenses incurred by a trustee in caring for mortgaged property unless the secured creditor assents to the expenditure. <sup>11</sup>

### § 585. Claim, estoppel or waiver of priority.

Priority need not be claimed in the petition for proof of claim as priority is a matter of administration and may be asserted at any time.<sup>14</sup>

Badger, 4 Ves. 165; *Ex parte* Barth, 22 Chan. D. 450.

<sup>7</sup> In re Torchia (C. C. A. 3d Cir.), 188 Fed. Rep. 207, the court said:

"But we are compelled to disagree with the District Court on the subject of the rents. In our opinion this question has been decided by the Supreme Court of Pennsylvania in Bausman's Appeal, 90 Pa. 178, and in Wolf's Appeal, 106 Pa. 545, and we are disposed to follow these rulings. It was there determined that, after insolvency has taken the debtor's real estate out of his hands, its income or product belongs to the lien creditors, who have thus become its virtual owners, and we can see no sufficient reason why the same rule should not apply to real estate in a court of bankruptcy."

\* In re Utt (C. C. A. 7th Cir.), 105 Fed. Rep. 754, 45 C. C. A. 32, 5 Am. B. R. 383; McNair v. McIntyre (C. C. A. 4th Cir.), 113 Fed. Rep. 113, 51 C. C. A. 89, 7 Am. B. R. 638; In re Alison Lumber Co., 137 Fed. Rep. 643, 14 Am. B. R. 78; In re Chavez (C. C. A. 8th Cir.), 149 Fed. Rep. 73, 80 C. C. A. 451, 17 Am. B. R. 641.

<sup>9</sup> B. A. 1898, Secs. 40 and 48, as amended by the act of February 5, 1903, 32 Stat. at L. 797, and the act of June 25, 1910; In re Sanford Furniture Mfg. Co., 126 Fed. Rep. 888, 11 Am. B. R. 414; In re Iowa Falls Mfg. Co., 140 Fed. Rep. 527, 15 Am. B. R. 384; In re Torchia (C. C. A. 3d Cir.), 188 Fed. Rep. 207.

10 In re Allert, 173 Fed. Rep. 691,
 23 Am. B. R. 101; In re Clark Coal
 & Coke Co., 173 Fed. Rep. 658, 23
 Am. B. R. 273.

11 In rc Vulcan Foundry & Mach.
 Co. (C. C. A. 3d Cir.), 180 Fed.
 Rep. 671, 103 C. C. A. 637, 24
 Am. B. R. 825.

<sup>14</sup> In re Jones, 151 Fed. 108, 18 Am. B. R. 206. A priority may be lost by estoppel but is not waived by participation in the election of a trustee.<sup>15</sup>

#### § 586. Taxes. 16

The court is required by the bankrupt act<sup>17</sup> "to order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district or municipality in advance of the payment of dividends to creditors," <sup>18</sup> including penalty or interest.<sup>20</sup>

The test is given in the statute. Are the taxes legally due "and owing" by the bankrupt? If they are, the trustee should pay them in advance of the payment of dividends to creditors. A claim for personal taxes due the city of New York is a debt. Whether a tax is "legally due and owing" depends upon the local law. The general rule is that a tax is legally due and owing from the day of assessment, although not payable until a later date. 23

15 In re Ashland Steel Co. (C. C. A. 6th Cir.), 168 Fed. Rep. 679, 94
 C. C. A. 165, 21 Am. B. R. 834.
 18 Priority to the United States,

see Sec. 595, post.

<sup>17</sup> B. A. 1898, Sec. 64a.

<sup>18</sup> B. A. 1898, Sec. 64a; In re Weiss, 159 Fed. Rep. 295, 20 Am. B. R. 247 (taxes due U. S. Government); In re Hilberg, 6 Am. B. R. 714 (referee's decision). State and county taxes.

Section 64a giving priority to taxes due by the bankrupt to the United States does not exclude priority in other matters as a general priority is given United States under Revised Statutes, Sec. 3466. Title Guaranty & Surety Co. v. Guarantee Title & Trust Co. (C. C. A. 3d Cir.), 174 Fed. Rep. 385, 98 C. C. A. 603, 23 Am. B. R. 340.

<sup>20</sup> B. A. 1898, Sec. 57*i*; In re Kallak, 147 Fed. 276, 17 Am. B. R. 414; In re Scheidt Bros., 177 Fed. Rep. 599, 23 Am. B. R. 778.

<sup>21</sup> City of Waco v. Bryan (C. C. A. 5th Cir.), 127 Fed. Rep. 79, 62 C. C. A. 79, 11 Am. B. R. 481; Chattanooga v. Hill (C. C. A. 6th Cir.), 139 Fed. Rep. 600, 71 C. C. A. 584, 15 Am. B. R. 195; *In re* Tilden, 91 Fed. Rep. 500, 1 Am. B. R. 300. A claim for personal taxes due the city of New York is a debt. Matter of Flatau, 21 Am. B. R. 352 (referee).

<sup>23</sup> In re Fivnn, 134 Fed. Rep. 145, 13 Am. B. R. 720; In re Keller, 109 Fed. Rep. 131, 6 Am. B. R. 351; New Jersey v. Anderson, 203 U. S. 483, 51 L: Ed. 284, 17 Am. B. R. 63.

As to the date of a foreign corporation tax in Ohio, see Emmer-

The fact that tax collectors had been negligent and have allowed taxes to remain unpaid for twelve years, does not affect their priority, although the taxes will take the larger part of the estate.<sup>25</sup> It has been held that a tax assessed against a bankrupt prior to adjudication was legally due and owing within the meaning of section 64, although not payable until after adjudication,<sup>26</sup> but not when it became due after the adjudication.

Whether a claim is for a tax within the meaning of section 64a is a question to be decided by the court of bankruptcy and not by the state courts.<sup>29</sup> Section 64a declares that in

man v. Specialty Co., 13 Am. B. R. 40, note. The court does not decide whether a state tax imposed upon the franchise of an insolvent corporation after the receiver in bankruptcy has taken possession is entitled to a preference under Sec. 64a. In re Halsey Electric Generator Co., 175 Fed. Rep. 825, 23 Am. B. R. 401, affirmed (C. C. A. 3d Cir.), 179 Fed. Rep. 321, 102 C. C. A. 505, 24 Fed. Rep. 562.

<sup>25</sup> In re Weissman, 178 Fed. Rep. 115, 24 Am. B. R. 150.

<sup>26</sup> In re Flynn, 134 Fed. Rep. 145, 13 Am. B. R. 720; New Jersey v. Anderson, 203 U. S. 483, 51 L. Ed. 284, 17 Am. B. R. 63; Emmerman v. Ohio Steel & Iron Specialty Co. (referee), 13 Am. B. R. 40; National Bank v. Altman, Miller & Co. (referee), 12 Am. B. R. 12. <sup>29</sup> In New Jersey v. Anderson, 203 U. S. 483, 51 L. Ed. 284, 17 Am. B. R. 63, the supreme court said: "While we take this view of the decision of the Supreme Court of New Jersey and reach the conclusion that the claim in question is for a tax within the meaning of the law as construed by that court, the bankruptcy act is a federal statute, the ultimate interpretation of which is in the Federal courts. It is doubtless true, as was said in the opinion of the learned judge speaking for the Circuit Court of Appeals, in this case, that if the highest court of the state should decide that a given statute imposed no tax within the meaning of the law as interpreted by it, a Federal court, in passing upon the bankruptcy act, would not compel the state to accept a preference from the bankrupt's estate upon a different view of the law. Conceding the doctrine that the meaning of a statute is a state question, except where rights, the subject of adjudication by the Federal courts, have accrued before its construction by the state court, or the question of contract within the protection of the Federal constitution is involved. still a state court, while entitled to great consideration, can not conclusively decide that to be a tax within the meaning of a Federal law, providing for the payment of taxes, which is not so in fact."

case of disputes as to the amount or legality of any such taxes, they are to be heard and determined by the court. The state court may construe a statute and define its meaning, but whether its construction creates a tax within the meaning of the bankruptcy act, giving a preference to taxes, is a federal question to be decided by the courts of the United States.<sup>30</sup>

Money collected by a bankrupt tax collector for a county is not a tax "due and owing" so as to be entitled to priority of payment. Taxes within the bankruptcy act include the cigarette tax of Iowa, water rents, local assessments, at a corporation franchise tax, for tax on capital stock, and penalties for nonpayment. In the following instances priority has been refused on the ground that the claim was not a tax, namely, a liquor license, a debt due the state on a judgment, or a claim for taxes, which the bankrupt agreed to pay on property which he leased, because his liability was entirely contractual.

New Jersey v. Anderson, 203
 U. S. 483, 51 L. Ed. 284, 17 Am.
 B. R. 63.

<sup>81</sup> In re Waller, 142 Fed. Rep. 883,
 15 Am. B. R. 753.

<sup>32</sup> In re Otto F. Lange Co., 159Fed. 586, 20 Am. B. R. 478.

<sup>33</sup> In re Industrial Cold Storage & Ice Co., 163 Fed. Rep. 390, 20 Am. B. R. 904.

<sup>34</sup> In re Stalker, 123 Fed. Rep. 961, 10 Am. B. R. 710.

<sup>35</sup> New Jersey v. Anderson, 203 U. S. 483, 51 L. Ed. 284, 17 Am. B. R. 63, reversing *In re* Cosmopolitan Power Co. (C. C. A. 7th Cir.), 137 Fed. Rep. 858, 70 C. C. A. 388, 14 Am. B. R. 604; In re Danville Rolling Mill Co., 121 Fed. Rep. 432, 10 Am. B. R. 327. Matter of Mutual Mercantile Agency, 8 Am. B. R 435 (referee).

<sup>87</sup> In re Wyoming Valley Ice Co., 145 Fed. Rep. 267, 21 Am. B. R. 1.

<sup>38</sup> In re Scheidt Bros., 177 Fed. Rep. 599, 23 Am. B. R. 778.

<sup>39</sup> In re Ott, 95 Fed. Rep. 274, 2 Am. B, R. 637.

<sup>40</sup> In re Alderson, 98 Fed. Rep. 588, 3 Am. B. R. 544.

<sup>41</sup> In re Broom, 123 Fed. Rep. 639, 10 Am. B. R. 427.

Tax claims may be disallowed as excessive, 42 or as paid, 43 or not properly assessed. 44

Where a partner is liable for partnership debts, such taxes have been given priority as against the partner's estate in bankruptcy, when there were no partnership assets.<sup>45</sup>

The trustee is bound to pay taxes on a life estate of the bankrupt out of the first money that comes to his hands. 46

There is some conflict in the opinions as to whether the trustee or secured creditors should pay the taxes on encumbered property. The better rule is that the trustee must pay all taxes owing by the bankrupt on all of his property at the date of bankruptcy, irrespective of its condition with reference to encumbrances.<sup>47</sup> The reason is that a tax is a personal debt against the taxpayer,<sup>47\*</sup> which is given priority by the express terms of the bankrupt act. There is some authority for limiting the taxes payable by the trustee to such as constitute a lien upon the bankrupt's estate in the hands of the trustee and remit the sovereign to the enforcement of any lien which it may have against the property which the trustee relinquished to secured creditors,<sup>48</sup> but assets should be marshaled to enable the taxes to be paid from the fund applicable to the payment of unsecured

<sup>42</sup> In re Selwyn Importing Co., 18 Am. B. R. 190, even though time for seeking relief in state courts has passed.

<sup>43</sup> Moore v. Green (C. C. A. 4th Cir.), 145 Fed. Rep. 480, 76 C. C. A. 250, 76 C. C. A. 242, 16 Am. B. R. 607.

44 In re Otto Freund Arnold Yeast Co., 178 Fed. Rep. 305, 24 Am. B. R. 458, where property assessed did not actually exist.

<sup>45</sup> In re Green, 116 Fed. Rep. 118, 8 Am. B. R. 553.

46 In re Force, 4 Am. B. R. 114.
 47 Chattanooga v. Hill (C. C. A. 6th Cir.), 139 Fed. Rep. 600, 71

C. C. A. 584, 15 Am. B. R. 195;
City of Waco v. Bryan (C. C. A. 5th Cir.), 127 Fed. Rep. 79, 62 C. C. A. 79, 11 Am. B. R. 481; In re Tilden, 91 Fed. Rep. 500, 1 Am. B. R. 300; In re Prince & Walter, 131 Fed. Rep. 546, 12 Am. B. R. 675.

47\* Chattanooga v. Hill (C. C. A. 6th Cir.), 139 Fed. Rep. 600, 71 C. C. A. 584, 15 Am. B. R. 195; Matter of Flatau, 21 Am. B. R. 352.

48 In re Stalker, 123 Fed. Rep.
961, 10 Am. B. R. 710; In re Brinker, 128 Fed. Rep. 634, 12 Am. B. R.
122; In re Veitch, 101 Fed. Rep.
251, 4 Am. B. R. 112.

debts.<sup>49</sup> Giving the words of the statute their plain meaning, it is clear that the trustee should pay all taxes owing by the bankrupt at the date of bankruptcy, whether the property taxed is administered by the trustee or not,<sup>50</sup> as where the property on which the taxes are owing is exempt by law <sup>51</sup> and does not pass to the trustee,<sup>51</sup> or where mortgaged property is relinquished to the mortgagee because the mortgaged debt exceeds the value of the property,<sup>52</sup> or where mortgaged property never comes into the possession of the trustee,<sup>53</sup> or where mortgaged property is sold by the trustee free of liens.<sup>54</sup>

Whether a purchaser at a sale may be required to pay taxes depends upon the contract of sale. If he buys subject to liens, he must pay the taxes.<sup>55</sup> If he buys free of all liens, the trustee must pay the taxes.<sup>56</sup> To prevent any controversy on this point the order of sale made by the referee should specify particularly what taxes are to be paid

<sup>49</sup> In re Barr Pumping Engine Co., 11 Am. B. R. 312 (referee).

5° Chattanooga v. Hill (C. C. A. 6th Cir.), 139 Fed. Rep. 600, 71 C. C. A. 584, 15 Am. B. R. 195; City of Waco v. Bryan (C. C. A. 5th Cir.), 127 Fed. Rep. 79, 62 C. C. A. 79, 11 Am. B. R. 481; In re Tilden, 91 Fed. Rep. 500, 1 Am. B. R. 300; In re Prince & Walter, 131 Fed. Rep. 546, 12 Am. B. R. 675. See, however, In re Homenfeltz, 94 Fed. Rep. 629; 2 Am. B. R. 499; In re Conhaim, 100 Fed. Rep. 268, 4 Am. B. R. 58; In re Veitch, 101 Fed. Rep. 251, 4 Am. B. R. 112.

<sup>51</sup> In re Tilden, 91 Fed. Rep. 500,
1 Am. B. R. 300; In re S. L. Baker,
1 Am. B. R. 526.

52 City of Waco v. Bryan (C. C. A. 5th Cir.), 127 Fed. Rep. 79,
 62 C. C. A. 79, 11 Am. B. R. 481.
 53 Chattanooga v. Hill (C. C. A.

6th Cir.), 139 Fed. Rep. 600, 71 C. C. A. 584, 15 Am. B. R. 195. The mortgagee is free to agree to pay taxes on condition that the property is surrendered to him, as was done in Equitable Loan Co. v. Moss (C. C. A. 5th Cir.), 125 Fed. Rep. 609, 60 C. C. A. 345, 11 Am. B. R. 111.

54 In re Prince & Walter, 131
 Fed. Rep. 546, 12 Am. B. R. 675;
 In re Keller, 109 Fed. Rep. 131, 6
 Am. B. R. 351.

But see *In re* Veitch, 101 Fed. Rep. 251, 4 Am. B. R. 112, and *In re* Brinker, 128 Fed. Rep. 634, 12 Am. B. R. 122.

<sup>55</sup> In re Hollenfeltz, 94 Fed. Rep.
629, 2 Am. B. R. 499; In re Gerry,
112 Fed. Rep. 958, 7 Am. B. R.
459; In re Brinker, 128 Fed. Rep.
634, 12 Am. B. R. 122; In re Fisher
& Co., 148 Fed. Rep. 907, 17 Am.
B. R. 404.

<sup>56</sup> In re Prince & Walter, 131
 Fed. Rep. 546, 12 Am. B. R. 675;
 In re Keller, 109 Fed. Rep. 131, 6
 Am. B. R. 351,

by the purchaser. Where a purchaser or other person pays taxes, he is not entitled to priority by invoking the doctrine of equitable subrogation to any right of the sovereign in this respect.<sup>57</sup>

Funds of the bankrupt which have come into the hands of the trustee are subject to taxation in the district where they would be taxable if bankruptcy had not intervened.<sup>58</sup> If property in the hands of an assignee, trustee, executor or administrator is not taxable under the local law, it is not taxable in the hands of a trustee in bankruptcy. Where property in the possession of the bankrupt is taxed by the local authorities, the trustee should pay these taxes in the same manner as the taxes due at the time of bankruptcy are paid.

A claim for taxes may be proved like any other claim, but it is not necessary to file a proof of claim.<sup>59</sup> Taxes are regularly paid by order of the referee. When the trustee files the receipts of the proper public officers for such payment, he is credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax, the matter may be heard and determined by the court.<sup>60</sup>

### § 587. Taxes paid after priority claims.

Subdivision a of section 64 provides that "the court shall order the trustee to pay all taxes \* \* \* \* \* in advance of the payment of dividends to creditors."

<sup>57</sup> In re Brinker, 128 Fed. Rep. 634, 12 Am. B. R. 122; Cooper Grocery Co. v. Bryan (C. C. A. 5th Cir.), 127 Fed. Rep. 815, 62 C. C. A. 495, 11 Am. B. R. 734.

58 Swarts v. Hammer, 194. U. S.
441, 48 L. Ed. 1060, 11 Am. B. R.
708, affirming 120 Fed. Rep. 256,
9 Am. B. R. 691; In re Sims, 118
Fed. Rep. 356, 9 Am. B. R. 162;
In re Conhaim, 100 Fed. Rep. 268,

4 Am. B. R. 58; In re Keller, 109 Fed. Rep. 131, 6 Am. B. R. 351; In re Fisher & Co., 148 Fed. Rep. 907, 17 Am. B. R. 404.

<sup>59</sup> In re Harvey, 122 Fed. Rep.
745, 10 Am. B. R. 567; In re Prince & Walter, 131 Fed. Rep. 546, 12 Am. B. R. 675; In re Flatan & Stern (referee), 21 Am. B. R. 352.

60 B. A. 1898, Sec. 64a.

Subdivision b of section 64 provides that "the debts to have priority, except as herein provided, and to be paid in full out of the bankrupt estates, and the order of payment shall be," and then specifies five classes of claims entitled to priority and the order of payment.

These provisions contemplate the payment of the priority claims ahead of taxes, if the estate is not sufficient to pay all of them.¹ The priority for taxes is given only as against the creditors entitled to dividends. The words "dividends to creditors" in the bankrupt act refer to dividends to general creditors.² Secured creditors and priority claimants are not paid dividends in the sense that word is used in the bankrupt act.³ They are paid in full. If there is not sufficient funds available for that purpose they are paid in full in the order of their priority to the extent that funds are available.

The phrase "except as herein provided" refers to the order of priority among the five classes enumerated in subdivision  $b.^4$  The expenses of preserving the estate and the expenses of administration are in no sense claims of creditors, whose rights must exist at the date of bankruptcy.<sup>5</sup> Claimants under clauses 4 and 5, namely; for wages and debts given priority by the state or United States laws, may be called creditors but they are taken out of the dividend class and entitled to full payment by express terms of the act.

New Jersey v. Lovell (C. C. A. 3d Cir.), 179 Fed. Rep. 321, 102 C.
C. A. 505, 24 Am. B. R. 562, affirming In re Halsey Elec. Generator
Co., 175 Fed. Rep. 825, 23 Am. B. R. 401; In re Force, 4 Am. B. R. 114.
But see In re Weiss, 159 Fed.
Rep. 295, 20 Am. B. R. 247; In re
Prince & Walter, 131 Fed. Rep. 546, 12 Am. B. R. 675.

<sup>2</sup> In re Barker, 111 Fed. Rep. 501,
 7 Am. B. R. 132; In re Smith, 108
 Fed. Rep. 39, 5 Am. B. R. 559.

In re Utt (C. C. A. 7th Cir.), 105 Fed. Rep. 754, 45 C. C. A. 32, 5 Am. B. R. 383; In re Fielding, 96 Fed. Rep. 800, 3 Am. B. R. 135; In re Goldsmith, 118 Fed. Rep. 763, 9 Am. B. R. 419; In re Ft. Wayne Elec. Corporation, 94 Fed. Rep. 109, 1 Am. B. R. 706; In re Mammoth Pine Lumber Co., 116 Fed. Rep. 731, 8 Am. B. R. 651.

<sup>4</sup> In re Halsey Elec. Generator Co., 175 Fed. Rep. 825, 833, 23 Am. B. R. 401.

<sup>5</sup> See Sec. 290, ante.

The priority claimants, therefore, are entitled to be paid in full in the order set forth in the statute, before taxes, may be ordered paid. The taxes against the bankrupt are to be paid before the general creditors come upon the fund for dividends.

#### § 588. Costs of preserving estate.

Of the claims entitled to payment in full before paying any debts of general creditors, the first class in order of payment is "the actual and necessary cost of preserving the estate subsequent to filing the petition." 66

This is really a cost of administration, which may be included in the third class of debts enumerated in section 64b, but Congress saw fit to provide for the payment of the cost of preserving the estate in advance of other costs of administration. It includes rent, charges for storage, insurance and the compensation of a receiver, marshal, watchman or keeper in caring for and preserving the property. In fact, it includes every necessary expense incident to the preservation of the estate of the bankrupt from the time the petition is filed, 67 but not fruitless services by an employe of a bankrupt rendered without employment. 69 It does not include all expenses and disbursements of receivers and other officers pending adjudication and the appointment of trustees, but only such expenses of officers or parties as are incurred in

<sup>66</sup> B. A. 1898, Sec. 64b, clause 1.
State of New Jersey v. Lovell (C. C. A. 3d Cir.), 179 Fed. 321, 102 C. C. A. 505, 24 Am. B. R. 562, affirming 175 Fed. Rep. 825, 23 Am. B. R. 401.

67 In re Allen, 96 Fed. Rep. 512, 3 Am. B. R. 38; In re Scott, 99 Fed. Rep. 404, 3 Am. B. R. 625; In re Alison Lumber Co., 137 Fed. Rep. 643, 648, 14 Am. B. R. 78; In re Little River Lumber Co., 101 Fed. Rep. 558, 3 Am. B. R. 682; In re Barrow, 98 Fed. 582, 3 Am. B. R. 414, harvesting of growing crops. See In re Carolina Cooper-

age Co.. 96 Fed. 604, 3 Am. B. R. 154.

Though the petition in bank-ruptcy is dismissed the court may charge up against the fund the expense of preserving the property and transferring it into money. In re DeLancey Stables Co., 170 Fed. 810, 22 Am. B. R. 406; In re Restein, 162 Fed. 986, 20 Am. B. R. 832, court may authorize receiver to borrow money on receiver's certificates.

<sup>69</sup> Matter of National Mercantile Agency, 11 Am. B. R. 451 (referee). preserving the estate. The court is not bound to allow the full sum actually expended, but only so much as it shall find to have been reasonable and necessary for the purpose.<sup>70</sup>

The actual and necessary expenses incurred for preserving the property should be reported in detail, under oath, and examined and approved or disapproved by the court.<sup>71</sup> Section 62 provides the manner of proving and allowing such claims and for the payment of such expenses. Section 64b provides the order in which they shall be paid.

This provision relates only to the preservation of the property after the petition is filed. The courts, however, will allow a receiver or assignee or his attorney pay for services rendered in preserving the estate prior to the filing of the petition in so far as such services are beneficial to the estate,<sup>72</sup> including rent for the occupation of the receiver and trustee and attorney's fees incurred in preserving the estate.<sup>73</sup>

Such expenses do not take precedence over lien creditors where the court takes possession and incurs the expenses and sells the property without the consent of the lienor.<sup>74</sup>

70 In re Allen, 96 Fed. Rep. 512,3 Am. B. R. 38.

71 B. A. 1898, Sec. 62.

<sup>72</sup> Randolph v. Scruggs, 190 U. S. 533, 47 L. Ed. 1165, 10 Am. B. R. 1; *In re* Chase (C. C. A. 1st Cir.), 124 Fed. Rep. 753, 59 C. C. A. 629, 10 Am. B. R. 677; Summers v. Abbott (C. C. A. 8th Cir.), 122 Fed. Rep. 36, 58 C. C. A. 352, 10 Am. B. R. 254; *In re* Zier & Co. (C. C. A. 7th Cir.), 142 Fed. Rep. 102, 73 C. C. A. 326, 15 Am. B. R. 646. <sup>73</sup> *In re* Grignard Litho. Co., 158 Fed. Rep. 557, 19 Am. B. R. 743; *In re* Jefferson, 93 Fed. Rep. 948, 2

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C. A. 7th Cir.), 142 Fed. Rep. 102, 73 C. C. A. 326, 15 Am. B. R. 646. <sup>73</sup> In re Grignard Litho. Co., 158 Fed. Rep. 557, 19 Am. B. R. 743; In re Jefferson, 93 Fed. Rep. 948, 2 Am. B. R. 206; In re Grimes Bros., 96 Fed. Rep. 529, 2 Am. B. R. 730. See In re Lacov (C. C. A. 2d Cir.), 142 Fed. 960, 74 C. C. A. 130, 15 Am. B. R. 290, receiver's expenses

charged to petitioning creditors on dismissal of the petition.

74 In re Vulcan Foundry & Machine Co. (C, C. A. 3d Cir.), 180 Fed. Rep. 671, 103 C. C. A. 637, 24 Am. B. R. 825. The mortgagee having a valid lien on property which was sold in bankruptcy, may properly be charged a fair amount for expenses in caring for the property when the bankruptcy was pending and before the sale: In re Evans Lumber Co., 176 Fed. Rep. 643, 23 Am. B. R. 881. Wage claims within three months before bankruptcy and while the receivership was in force are entitled to priority over the claims of a mortgagee. In re Erie Lumber Co., 150 Fed. 817, 17 Am, B. R. 689. Cf. In re Yoke Vitrified Brick Co., 180 Fed. Rep.

Where an assignee for creditors after the filing of the petition took care of the estate for some years before the adjudication where no receiver in bankruptcy was appointed he may be given a priority by payment of his services and disbursement made during that time. "The assignee may not improperly be treated as a *quasi-receiver* during the pendency, of the proceeding for adjudication." <sup>76</sup>

#### § 589. Filing fees and expenses of recovering property.

Of the claims entitled to payment in full before paying any debts of general creditors, the second class in order of payment is the filing fees paid by creditors in involuntary cases.<sup>77</sup>

Since the amendment of 1903, where property of the bankrupt, transferred or concealed by him, either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, they are entitled to be allowed the reasonable expenses of such recovery.<sup>78</sup> Such expenses were allowed by the court under its general equity powers before the amendment.<sup>79</sup>

#### § 590. Costs of administration.

Of the claims entitled to payment in full before paying any debts of general creditors, the third class in order of payment is the cost of administration.<sup>81</sup>

Cost of administration includes the fees and mileage payable to witnesses as provided by the laws of the United

235, 25 Am. B. R. 18 (where laborers claims were held subject to the claims of lienors). *Cf.* however, as to expenses of sale free of liens. Sec. —.

<sup>76</sup> In re Stewart (C. C. A. 6th Cir.), 179 Fed. 222, 102 C. C. A. 348, 24 Am. B. R. 474.

77 B. A. 1898, Sec. 64b, clause 2,
 In re Silverman, 97 Fed. Rep. 325,
 3 Am. B. R. 227. See also B. A.

1898, Sec. 3e; Gen. Ord. 34; Sec. 249, ante.

<sup>78</sup> Act of Feb. 5, 1903, 32 Stat. at L. 797.

<sup>79</sup> In re Lesser, 100 Fed. Rep. 433, 3 Am. B. R. 815, affirmed by C. C. A. 2d Cir., in 5 Am. B. R. 320; In re Allen, 96 Fed. Rep. 512, 3 Am. B. R. 38.

81 B. A. 1898, Sec. 64b, clause 3. Whether taxes precede expenses of administration, see Sec. 587, ante.

States.<sup>82</sup> It must appear that the witness fees have been actually paid before they are entitled to priority.<sup>83</sup> Mileage can only be allowed upon showing the residence or place of business, or the distance necessarily traveled by the witness.<sup>84</sup>

The actual and necessary expenses incurred by officers in the administration of an estate are entitled to priority under this clause. Such expenses include rent, for premiums for insurance, money paid for care and storage of the property, for marshal's fees, for advertising and giving notice to creditors, for premiums to bonding company, for trustee's bond, to a stenographer employed under section 38a, clause 5, for traveling and incidental expenses of a referee or trustee and those of any clerk or other officer attending him in the performance of his duties, and any other necessary expense actually incurred by the referee, trustee, receiver, or marshal incident to the management or settlement of the estate.

The expenses of a sale include advertisement, appraisement, auctioneer's fees, etc., are entitled to priority as costs of administration. So Such expenses are usually paid out of the proceeds of the sale, which belongs to the general creditors. Where a court of bankruptcy sells mortgaged property, it is only fair that the secured creditor bear his proportion of

<sup>82</sup> B. A. 1898, Sec. 64b, clause 3, R. S. Secs. 848, 849; Hoffschlaeger Co. v. Young Nap, 12 Am. B. R. 526.

<sup>83</sup> Hoffschlaeger Co. v. Young Nap, 12 Am. B. R. 526.

84 In re Todd, 109 Fed. Rep. 265,6 Am. B. R. 88.

85 In re Daniels, 130 Fed. Rep. 597, 12 Am. B. R. 446; In re Tebo, 101 Fed. Rep. 419, 4 Am. B. R. 235; In re Carolina Cooperage Co., 96 Fed. Rep. 950, 3 Am. B. R. 154; In re Mammoth Pine Lumber Co., 116 Fed. Rep. 731, 8 Am. B. R. 651; In re Allen, 96 Fed. Rep. 512, 3 Am. B. R. 38; In re Scott, 99 Fed. Rep.

404, 3 Am. B. R. 625; In re Pierce, 111 Fed. Rep. 516, 6 Am. B. R. 747; In re Prince & Walter, 131 Fed. Rep. 546, 12 Am. B. R. 675; In re Lèngert Wagon Co., 110 Fed. Rep. 927, 6 Am. B. R. 535; In re Pattee, 143 Fed. Rep. 994, 16 Am. B. R. 450; In re Castleberry, 143 Fed. Rep. 1021, 16 Am. B. R. 431.

<sup>86</sup> In re Hersey, 171 Fed. Rep. 1004, 22 Am. B. R. 856, 860, 863.

<sup>87</sup> In re Alaska Fishing & Development Co., 167 Fed. Rep. 875, 21 Am. B. R. 685, receivers' certificates.

88 A per diem of \$5.00 to appraisers is all that is allowed in a Penn-

these expenses.<sup>89</sup> Money advanced for expenses by the bankrupt or other person is entitled to priority as costs of administration.<sup>90</sup>

A deficiency resulting from continuing the business of the bankrupt has been allowed priority over general creditors, 91 but not as against claims of secured creditors. 92 Costs awarded against a trustee in a state court have been ordered paid in full, but not a judgment for damages for detention of property. 93

The expenses of administration must be reported in detail, under oath, and examined and approved by the court. The accounts should be itemized, with proper vouchers when vouchers can be procured, and the affidavit should state that the amounts charged were necessary, just, and reasonable. The expenses of a trustee are usually made in his regular reports to the court and are allowed upon confirmation of such reports. If an officer fails to itemize and verify his account, the court will not allow it. It is not necessary to give creditors notice before allowing items of expense as a cost of administration. The court is not bound to allow the

sylvania district, and it must be an extraordinary case where over two or three days are necessary for appraisers. If there is occasion for anything more than that the trustee must justify it. An appraiser's fee of \$40 was designated as outrageous, and was cut down to \$15. In re E. I. Fidler & Son, 172 Fed. Rep. 632, 21 Am. B. R. 101.

89 In re Utt (C. C. A. 7th Cir.), 105 Fed. Rep. 754, 45 C. C. A. 32, 5 Am. B. R. 383; In re Alison Lumber Co., 137 Fed. Rep. 643, 14 Am. B. R. 78; In re Cogley, 107 Fed. Rep. 73, 5 Am. B. R. 731; McNair v. McIntyre (C. C. A. 4th Cir.), 113 Fed. Rep. 113, 51 C. C. A. 89, 7 Am. B. R. 638; In re Goldsmith, 118 Fed. Rep. 763, 9 Am. B. R. 419; In re Hughes, 170 Fed. 809, 22 Am. B. R. 303.

<sup>90</sup> Gen. Ord. 10. In re Hatcher,
 145 Fed. Rep. 658, 16 Am. B. R. 722.
 <sup>91</sup> In re Prince & Walter, 131 Fed.
 Rep. 546, 12 Am. B. R. 675.

92 In re Bourlier Cornice & Roofing Co., 133 Fed. Rep. 958, 13 Am.
B. R. 585; In re Prince & Walter, 131 Fed. Rep. 546, 12 Am. B. R. 675.

93 In re Neely, 108 Fed. Rep. 371,5 Am. B. R. 836.

<sup>94</sup> B. A. 1898, Sec. 62; Gen. Ords. 19 and 26.

95 Gen. Ords. 19 and 20.

<sup>96</sup> In re Daniels, 130 Fed. Rep.
597, 12 Am. B. R. 446; In re Carolina Cooperage Co., 96 Fed. Rep.
950, 3 Am. B. R. 154; In re Hoyt,
119 Fed. Rep. 987, 9 Am. B. R. 574.
<sup>97</sup> In re Stotts, 93 Fed. Rep. 438,
1 Am. B. R. 641.

full sum actually expended, but only so much as it shall find to have been reasonable and necessary for the purpose. 98 Section 62 provides the manner of proving and allowing expenses of officers in administering an estate and for the payment of such accounts. Section 64b gives such accounts priority of payment.

#### § 591. Attorney's fees.

Costs of administration also include one reasonable attorney's fee for professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, <sup>99</sup> to the bankrupt in involuntary cases while performing the duties by the statute prescribed and to the bankrupt in voluntary cases, as the court may allow. <sup>109</sup>

It will be observed that attorney's fees are allowed as costs of administration in three classes of cases. The priority is allowed for professional services only, and only a reasonable fee for services actually rendered, the amount of which is to be determined by the court. The subject of attorney's fees is considered elsewhere.

Under section 60d the bankruptcy court has jurisdiction to re-examine the validity of a payment made to an attorney.<sup>5</sup> The state court can not review the reasonableness of an attorney's fee under section 60 as only the bankruptcy court can do that.<sup>6</sup>

98 In re Allen, 96 Fed. Rep. 512,
 3 A. B. R. 38.

<sup>99</sup> But not where no adjudication is made. *In re* Black Diamond Copper Mining Co. (Ariz. 1906), 85 P. 653.

100 B. A. 1898, Sec. 64b, clause 3.
 Cf. Sec. 60d; In re Grignard Litho.
 Co., 158 Fed. 557, 19 Am. B. R. 743.

<sup>1</sup> In re Connell & Sons, 120 Fed. Rep. 846, 9 Am. B. R. 474.

<sup>2</sup> In re Rosenthal, 120 Fed. Rep. 848, 9 Am. B. R. 626; In re Carr, 117 Fed. Rep. 572, 9 Am. B. R. 58.

<sup>8</sup> In re Curtis (C. C. A. 7th Cir.), 100 Fed. Rep. 784, 41 C. C. A. 59, 4 Am. B. R. 17; Smith v. Cooper (C. C. A. 5th Cir.), 120 Fed. Rep. 230, 56 C. C. A. 578, 11 Am. B. R. 755; In re Goldville Mfg. Co., 118 Fed. Rep. 892, 10 Am. B. R. 552. Cf. B. A. 1898, Sec. 60d.

<sup>4</sup> See Sec. 105, et seq., ante.

<sup>6</sup> See Sec. 107, ante; Wood v. Henderson <sup>2</sup>10 U. S. 246, 52 L. Ed. 1046, 20 Am. B. R. 1.

<sup>6</sup> Swartz v. Frank, 183 Mo. 438, 82 S. W. 60.

#### § 592. Wages or labor claims.

Of claims entitled to payment in full before paying any debts of general creditors, the fourth class in order of payment is wages due to workmen, clerks, traveling or city salesmen, or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed \$300 to each claimant.<sup>1</sup>

This provision furnishes the exclusive rule for determining what debts for wages are entitled to priority. Where a state statute gives priority to wages earned more than three months prior to insolvency proceedings, such claims are not entitled to priority under section 64b, clause 5, of the bankrupt act, as section 64b, clause 4, is held to exclude claims for wages from section 64b, clause 5.<sup>2</sup>

The claims of secured creditors are paid before labor claims,<sup>8</sup> and labor claims before taxes.<sup>4</sup> Where the state law gives not a priority, but a lien on the bankrupt's property and this lien becomes fixed before the petition in bankruptcy is filed, it will be respected.<sup>5</sup> If the labor claimant fails to comply with the state statute so as to create a lien, his claim is not entitled to priority.<sup>6</sup>

<sup>1</sup>B. A. 1898, Sec. 64b, clause 4. "Traveling or city salesmen" were included by the amendment of June 15, 1906, 34 Stat. at L. 267.

<sup>2</sup> In re Rouse, Hazard & Co. (C. C. A. 7th Cir.), 91 Fed. Rep. 96, 33 C. C. A. 356, 1 Am. B. R. 234; In re Shaw, 109 Fed. Rep. 782, 6 Am. B. R. 501; In re Slomka (C. C. A. 2d Cir.), 122, Fed. Rep. 630, 58 C. C. A. 352, 9 Am. B. R. 635.

<sup>8</sup> See Sec. 594, ante; In re City Trust Co. (C. C. A. 6th Cir.), 121 Fed. Rep. 706, 58 C. C. A. 126, 10 Am. B. R. 231; In re Yoke Vitrified Brick Co., 180 Fed. Rep. 235, 25 Am. B. R. 18; *In re* Erie Lumber Co., 150 Fed. Rep. 817, 17 Am. B. R. 689; *In re* Proudfoot, 173 Fed. Rep. 733, 23 Am. B. R. 106.

4 See Sec. 587, ante.

In re Lawler, 110 Fed. Rep. 135,
6 Am. B. R. 184; In re Laird (C. C. A. 6th Cir.), 109 Fed. Rep. 550,
48 C. C. A. 538, 6 Am. B. R. 1;
see also In re City Trust Co. (C. C. A. 6th Cir.), 121 Fed. Rep. 706, 58
C. C. A. 126, 10 Am. B. R. 231.

<sup>6</sup> In re Burton Bros. Mfg. Co., 134 Fed. Rep. 157, 14 Am. B. R. 218; In re Meis, 18 Am. B. R. 104 (Referee). The priority for wages is limited to wages earned within three months immediately preceding the filing of the petition.<sup>7</sup> This does not mean the three months last employed, as where business was suspended prior to bankruptcy.<sup>8</sup> Wages may be said to be earned even if the employe is on his vacation during a part of the three months' period.<sup>9</sup> A father is entitled to priority for the services rendered by his minor son as a workman.<sup>10</sup>

Where the claim arises under a contract for labor, including the services of a team, the claimant is entitled to priority for his personal services only. An employe is not entitled to priority in payment of wages for an unexpired term of employment, where he was wrongfully discharged, and a judgment for breach of a contract of employment is not entitled to priority. A person having a labor claim entitled to priority does not lose his priority by having obtained a judgment on it within four months prior to the filing of the petition.

<sup>7</sup> B. A. 1898, Sec. 64, clause 4; In re Slomka (C. C. A. 2d Cir.), 122 Fed. Rep. 630, 58 C. C. A. 352, 9 Am. B. R. 635; In re Rouse, Hazard & Co. (C. C. A. 7th Cir.), 91 Fed. Rep. 96, 33 C. C. A. 356, 1 Am. B. R. 234; In re Burton Bros. Mfg. Co., 134 Fed. Rep. 157, 14 Am. B. R. 218; In re Gladding Co., 120 Fed. Rep. 709, 9 Am. B. R. 700.

In re Huntenberg, 153 Fed. Rep. 768, 18 Am. B. R. 697, it was held that an infant's claim for wages before three months was not preferred.

8 In re Slomka (C. C. A. 2d Cir.),
122 Fed. Rep. 630, 58 C. C. A. 352,
9 Am. B. R. 635; In re Rouse, Hazard & Co. (C. C. A. 7th Cir.),
91 Fed. Rep. 96, 33 C. C. A. 356, 1 Am. B. R. 234.

<sup>9</sup> In re Gladding, 120 Fed. Rep. 709, 9 Am. B. R. 700, the court said:

. "Vacation wages can not be regarded as a mere gratuity, given in recognition of past or present services. By continuing the relation of employer and employe during a dull season, the employer holds his working force in readiness for the active season."

<sup>10</sup> In re Harthorn, No. 6162 Fed. Cas., 4 N. B. R. 103.

<sup>11</sup> In re Winton Lumber & Mfg. Co., 17 Am B. R. 117.

But see *In re* Blackman, 6 Chi. Leg. News 18.

<sup>12</sup> In re Pevear, No. 11053 Fed. Cas., 17 N. B. B. R. 461, 21 Fed. Rep. 121.

<sup>18</sup> In re Lewis Co. (Ref.), 12 Am.
 B. R. 279. See also Sec. 311, ante.
 <sup>14</sup> In re Anson, 101 Fed. Rep. 698,
 4 Am. B. R. 231.

The word "wages" as here used means compensation for services rendered. It includes salaries, 6 commissions, 7 or where a laborer is paid by the piece, 8 as well as wages paid by the day, week or month. 9

The priority for wages is limited to \$300 for each employe and the claimant is a general creditor for any balance of wages that may be due him.<sup>20</sup> The court has permitted claimants to apply payments on account to wages due before the three months' period and allowed priority for wages earned in the last three months.<sup>21</sup>

The persons entitled to priority for wages are "workmen, clerks, traveling or city salesmen, or servants." <sup>22</sup> If a claimant is within one of these classes he is entitled to the priority. <sup>23</sup>

15 In re Dexter (C. C. A. 1st
 Cir.), 158 Fed. Rep. 789, 89 C. C.
 A. 285, 20 Am. B. R. 47; In re
 Roebuck Weather Strip & Wire
 Screen Co., 180 Fed. Rep. 497, 24
 Am. B. R., 532.

<sup>16</sup> In re Baumblatt, 156 Fed. Rep.422, 19 Am. B. R. 500.

In re Gay, 188 Fed. Rep. 392, Judge Dodge said: "It can not be said, in view of In re Dexter, 158 158 Fed. 788, decided by the Court of Appeals for this Circuit in 1907, that he is any the less within the meaning of the section referred to because he was receiving a salary of \$3,000 a year instead of receiving a comparatively small compensation for his services, and, therefore, presumably dependent upon his earnings for present support."

17 In re Dexter (C. C. A. 1st
 Cir.), 158 Fed. Rep. 789, 89 C. C.
 A. 285, 20 Am. B. R. 47; In re
 Roebuck Weather Strip & Wire
 Screen Co., 180 Fed. Rep. 497, 24
 Am. B. R. 532.

<sup>18</sup> In re Gurewitz (C. C. A. 2d
 Cir.), 121 Fed. Rep. 982, 58 C. C.
 A. 320, 10 Am. B. R. 350.

<sup>19</sup> In re Caldwell, 164 Fed. Rep. 515, 21 Am. B. R. 236.

<sup>20</sup> B. A. 1898, Sec. 64b, clause 4;
 In re Roebuck Weather Strip & Wire Screen Co., 180 Fed. Rep. 497,
 24 Am. B. R. 532.

21 In re McIntyre Bros. (Ref.),
 21 Am. B. R. 588; In re Andrews (Ref.),
 19 Am. B. R. 441.

<sup>22</sup> B. A. 1898, Sec. 64*b*, as amended by the act of June 15, 1906, 34 Stat. at L. 267.

The act of 1867 gave priority for wages to "any operative, clerk or house servant, to the amount of \$50," R. S. Sec. 5101.

<sup>28</sup> In re Gurewitz (C. C. A. 2d Cir.), 121 Fed. Rep. 982, 58 C. C. A. 320, 10 Am. B. R. 350; In re Caldwell, 164 Fed. Rep. 515, 21 Am. B. R. 236; In re Dexter (C. C. A. 1st Cir.), 158 Fed. Rep. 789, 89 C. C. A. 285, 20 Am. B. R. 47; In re Gay, 188 Fed. Rep. 392; In re Fink, 163 Fed. Rep. 135, 20 Am. B. R. 897.

Priority under this section has been allowed to a salesman employed in a shop,<sup>24</sup> a bookkeeper,<sup>25</sup> one temporarily employed in adjusting books and accounts of a bankrupt,<sup>26</sup> or a musician at weekly wages on a roof garden,<sup>27</sup> or a workman paid by the piece,<sup>28</sup> or an apprentice for labor done after his apprenticeship under an agreement for a specific compensation.<sup>29</sup>

Traveling or city salesmen were not entitled to priority in proceedings instituted before the amendment of 1906,<sup>30</sup> but the amendment extended the right of priority for wages to traveling or city salesmen.<sup>31</sup> A person soliciting orders for weather strips is a salesman, although it was a part of his duty to supervise the installation of the strips.<sup>32</sup>

If a claimant is not a workman, clerk, traveling or city salesman or servant, he is not entitled to priority for wages.<sup>33</sup> The following persons have been held not included in the classes entitled to priority: the president or general manager of a corporation,<sup>34</sup> a blacksmith working in his own shop,<sup>35</sup> a gen-

<sup>24</sup> In re Flick, 105 Fed. Rep. 503,
5 Am. B. R. 465; In re King Co.,
113 Fed. Rep. 120, 7 Am. B. R. 619.
<sup>25</sup> In re Baumblatt, 156 Fed. Rep.
422, 19 Am. B. R. 500.

<sup>26</sup> Ex parte Rockett, No. 11977 Fed. Cas., 2 Low. 522.

<sup>27</sup> In re Caldwell, 164 Fed. Rep.
 515, 21 Am. B. R. 236.

<sup>28</sup> In re Gurewitz (C. C. A. 2d Cir.), 121 Fed. Rep. 982, 58 C. C. A. 320, 10 Am. B. R. 350; In re Copper King, 143 Fed. Rep. 649, 16 Am. B. R. 148.

<sup>29</sup> In re Steiner, No. 13354 Fed. Cas., 1 Pa. L. J. 368.

80 Act of June 15, 1906, 34 Stat. at L. 267; In re Photo Electric Engraving Co., 155 Fed. Rep. 684, 19 Am. B. R. 94; In re Greenewald, 99 Fed. Rep. 705, 3 Am. B. R. 696; In re Scanlan, 97 Fed. Rep. 26, 3 Am. B. R. 202.

31 In re Dexter (C. C. A. 1st

Cir.), 158 Fed. Rep. 789, 89 C. C. A. 285, 20 Am. B. R. 47; In re Gay, 188 Fed. Rep. 392; In re Fink, 163 Fed. Rep. 135, 20 Am. B. R. 897.

<sup>32</sup> In re Roebuck Weather Strip & Wire Screen Co., 180 Fed. Rep. 497, 24 Am. B. R. 532.

<sup>83</sup> In re Grubbs-Wiley Grocery Co., 96 Fed. Rep. 186, 2 Am. B. R. 442; In re Carolina Cooperage Co., 96 Fed. Rep. 950, 3 Am. B. R. 154; In re Brown & Co., 171 Fed. Rep. 281, 22 Am. B. R. 496; Matter of Zotti (Ref.), 23 Am. B. R. 607.

<sup>34</sup> In re Carolina Cooperage Co.,
96 Fed. Rep. 950, 3 Am. B. R. 154;
In re Grubbs-Wiley Grocery Co.,
96 Fed. Rep. 183, 2 Am. B. R. 442;
In re Brown & Co., 171 Fed. Rep. 281, 22 Am. B. R. 496.

But see In re Andrews (Ref.), 19 Am. B. R. 441.

35 Weaver v. Hugill Shoe & Supply Co. (Ref.), 16 Am. B. R. 516.

eral buyer for jobbers,<sup>36</sup> a music teacher,<sup>37</sup> an editor of a newspaper,<sup>38</sup> a contractor,<sup>39</sup> or the manager of a branch office of a broker.<sup>40</sup>

### § 593. Subrogation to the rights of labor claimants.

An assignee of wages due for labor is entitled to priority of payment, whether the assignment was made before or after the commencement of bankruptcy proceedings.<sup>1</sup> The supreme court has said: <sup>2</sup> "The priority is attached to the debt and not to the person of the creditor; to the claim and not to the claimant."

A person who loans money to pay wages is not subrogated to the rights of the laborers or entitled to priority.<sup>3</sup> The reason is that where a claim for wages is paid, it is extinguished and no priority can attach to it. Where the claim is sold or assigned it still exists and is entitled to priority. It is a general rule in equity that one who furnished money to pay preferential claims is not entitled to priority over other creditors. Subrogation exists by virtue of contract with the claimant and not by any agreement with the debtor.<sup>4</sup>

<sup>36</sup> Matter of Smith (Ref.), 11 Am. B. R. 646.

<sup>37</sup> First Nat. Bank v. Barnum, 160 Fed. Rep. 245, 20 Am. B. R. 439.

<sup>38</sup> Matter of Zotti (Ref.), 23 Am. B. R. 607.

<sup>39</sup> In re Rose (Ref.), 1 Am. B. R. 68.

<sup>40</sup> In re Brown & Co., 171 Fed. Rep. 281, 22 Am. B. R. 496.

<sup>1</sup> Shropshire, Woodliff & Co. v. Bush, 204 U. S. 186, 51 L. Ed. 436, 17 Am. B. R. 77; In re Harmon, 128 Fed. Rep. 170, 11 Am. B. R. 64; In re Campbell, 102 Fed. Rep. 686, 4 Am. B. R. 535; In re Brown, No. 1974 Fed. Cas., 4 Ben. 142; In re Fuller & Bennett, 152 Fed. Rep. 538, 18 Am. B. R. 443 (though assignment before bankruptcy); United Surety Co. v. Iowa Mfg. Co. (C. C. A. 8th Cir.),

179 Fed. 55, 102 C. C. A. 623, 24 Am. B. R. 7?8; contra, In re Westlund, 99 Fed. 399, 3 Am. B. R. 646; In re St. Louis Ice Mfg. & Storage Co., 147 Fed. 752, 17 Am. B. R. 194.

Shropshire, Woodliff & Co. v.
Bush, 204 U. S. 186, 51 L. Ed. 436,
17 Am. B. R. 77.

<sup>8</sup> Theobald v. Hammond (C. C. A. 6th Cir.), 133 Fed. Rep. 525, 66 C. C. A. 496; In re North Carolina Car Co., 127 Fed. Rep. 178, 11 Am. B. R. 488; In re St. Louis Ice Mfg. & Storage Co., 147 Fed. Rep. 752, 17 Am. B. R. 194; United Surety Co. v. Iowa Mfg. Co. (C. C. A. 8th Cir.), 179 Fed. Rep. 55, 102 C. C. A. 623, 24 Am. B. R. 728.

<sup>4</sup> Browder & Co. v. Hill (C. C. A. 6th Cir.), 136 Fed. Rep. 821, 69 C.

A merchant, who supplies goods to workmen of a bankrupt corporation and takes wage orders and charges the corporation for the goods sold, is not entitled to be subrogated to the laborer's claim for priority out of the property of the bankrupt.<sup>5</sup>

A person who loans money to pay preferred claims is a general creditor.<sup>6</sup>

## § 594. Debts entitled to priority under the laws of the states or United States.

Of the debts entitled to payment before paying any debts of general creditors the fifth class in order of payment is debts owing to any person who by the laws of the states or the United States is entitled to priority.<sup>7</sup>

A state is a "person" within this section and entitled to priority wherever state laws so provide.8

This clause does not adopt the state laws with reference to the priority of labor claims.<sup>12</sup>

Where a claimant has a lien he is preferred not because section 64b, clause 5, of the bankrupt act, gives him priority, but because the bankrupt act recognizes all valid liens, <sup>13</sup>

C. A. 499, 14 Am. B. R. 619; United Surety Co. v. Iowa Mfg. Co. (C. C. A. 8th Cir.), 179 Fed. Rep. 55, 102C. C. A. 623, 24 Am. B. R. 728.

Browder & Co. v. Hill (C. C. A. 6th Cir.), 136 Fed. Rep. 821, 69 C.
C. A. 499, 14 Am. B. R. 619.

Browder & Co. v. Hill (C. C. A.
6th Cir.), 136 Fed. Rep. 821, 69 C.
C. A. 499, 14 Am. B. R. 619; United
Surety Co. v. Iowa Mfg. Co. (C.
C. A. 8th Cir.), 179 Fed. Rep. 55,
102 C. C. A. 623, 24 Am. B. R. 728.

<sup>7</sup> B. A. 1898, Sec. 64b, clause 5.

<sup>8</sup> In re Western Implement Co., 166 Fed. Rep. 576, 22 Am. B. R. 167. The claim of the state of Minnesota for merchandise made by convict labor and sold to the bankrupt is entitled to priority under the state law and the bankruptcy act, Sec. 64b. In re Mercer (C. C. A. 8th

Cir.), 171 Fed. Rep. 81, 96 C. C. A. 185, 22 Am. B. R. 413. Whether a state is entitled to priority at common law is discussed but not decided in *In re* Devlin, 180 Fed. Rep. 170, 24 Am. B. R. 863. The United States is not a "person" affected by this section. Title Guaranty & Surety Co. v. Guarantee Title & Trust Co. (C. C. A. 3d Cir.), 174 Fed. Rep. 385, 98 C. C. A. 603, 23 Am. B. R. 340.

<sup>12</sup> In re Rouse, Hazard & Co. (C. C. A. 7th Cir.), 91 Fed. Rep. 96, 1 Am. B. R. 234; In re Shaw, 109 Fed. Rep. 782, 6 Am. B. R. 501; In re Slomka (C. C. A. 2d Cir.), 122 Fed. Rep. 630, 58 C. C. A. 322, 9 Am. B. R. 635.

 <sup>18</sup> B. A. 1898, Sec. 67d; In re Lawler, 110 Fed. Rep. 135, 6
 Am. B. R. 184; In re Laird (C. C. which it does not specifically dissolve. Thus where a state law gives a lien for one year's rent, on the goods on the premises, the landlord is entitled to the proceeds of the sale of such goods up to that amount.<sup>14</sup> Where no lien is created in favor of the landlord his claim for rent is not entitled to priority,<sup>15</sup> except under special state statute.<sup>17</sup>

The time of filing the petition fixes the status as to priorities so a provision in a lease accelerating all rent on default in payment of one installment creates no prority for the rent accelerated as it becomes operative only after the filing of the petition. A mere judgment is not entitled to priority though due to the state; and when a judgment becomes a lien depends upon the laws of the state in which it is asserted. On the state of the state in which it is asserted.

This clause of the bankrupt act does not make all liens under the state laws equal, but leaves them the priority which the state law gives them.<sup>21</sup> So where the state statutes give a lien to both landlord and a wage-earner their priority will be determined by the state law.<sup>22</sup> Where the state law gives no priority over other creditors for money

A. 6th Cir.), 109 Fed. Rep. 550, 48 C. C. A. 548, 6 Am. B. R. 1; *In re* City Trust Co. (C. C. A. 6th Cir.), 121 Fed. Rep. 706, 58 C. C. A. 126, 10 Am. B. R. 231.

14 In re Mitchell, 116 Fed. Rep.
87, 8 Am. B. R. 324; Wilson v. Penn Trust Co. (C. C. A. 3d Cir.), 114 Fed. Rep. 742, 52 C. C. A. 374, 8 Am. B. R. 169; In re Hoover, 113 Fed. Rep. 136, 7 Am. B. R. 330; In re Duble, 117 Fed. Rep. 794, 9 Am. B. R. 121.

15 In re Whealton Restaurant Co.,
 143 Fed. Rep. 921, 16 Am. B. R.
 294; In re Lewis Ruppel, 97 Fed.
 Rep. 778, 3 Am. B. R. 233 (Pennsylvania).

Under Maryland law as construed by its court of appeals, a landlord is not entitled to a lien for rent on the chattels on the premises, where bankruptcy proceedings are begun before the landlord distrains. *In re* Southern Co., 180 Fed. Rep. 838, 24 Am. B. R. 813; *In re* Chaudron & Peyton, 180 Fed. Rep. 841, 24 Am. B. R. 811.

<sup>17</sup> In re Consumers Coffee Co.,
 151 Fed. Rep. 933, 18 Am. B. R. 500;
 In re Bishop, 153 Fed. Rep. 304, 18
 Am. B. R. 635 (South Carolina).

<sup>18</sup> In re Winfield Mfg. Co., 137 Fed. 984, 15 Am. B. R. 257.

<sup>19</sup> In re Falls City Shirt Mfg. Co.,
 98 Fed. Rep. 592, 3 Am. B. R. 437.
 <sup>20</sup> Pence v. Çochran, 6 Fed. Rep.
 269; In re Lowe, 19 Fed. Rep. 589.

<sup>21</sup> Falls City Shirt Mfg. Co., 98 Fed. Rep. 592, 3 Am. B. R. 437.

<sup>22</sup> In re Byrne, 97 Fed. Rep. 762,
 3 Am. B. R. 268.

due the county by a delinquent tax collector it is not entitled to priority in bankruptcy.<sup>23</sup> A state law exempting wages or salary will be enforced in bankruptcy.<sup>24</sup> Where a landlord distrains for rent after adjudication he will not be entitled to the amount distrained for as the property is in custodia legis, but will be given the priority which the state law gives to a landlord in case of execution.<sup>25</sup> Where, as in Pennsylvania, the vendor has no lien on real estate for the purchase price, but a bare legal title, if the trustee of the vendee severs part of the structures and sells them, the proceeds go to the general creditors.<sup>26</sup>

The insolvency laws of the states are considered as remaining in force since the passage of the bankruptcy act, so where these laws give priority to certain debts, when the estate is administered in insolvency, the same priorities will ordinarily be allowed when the estate is administered in bankruptcy,<sup>27</sup> and so of a state statute as to dissolution of a corporation.<sup>28</sup>

<sup>23</sup> In re Waller, 142 Fed. Rep. 883, 15 Am. B. R. 753.

<sup>24</sup> In re Holden, 127 Fed. Rep. 980, 12 Am. B. R. 96.

<sup>25</sup> In re Duble, 117 Fed. Rep. 794,
 9 Am. B. R. 121.

<sup>26</sup> In re Clark, 118 Fed. Rep. 358,
 9 Am. B. R. 252. See also In re Hamilton, 102 Fed. Rep. 683, 4 Am. B. R. 543.

<sup>27</sup> In re Bennett (C. C. A. 6th Cir.), 153 Fed. Rep. 673, 82 C. C. A. 531, 18 Am. B. R. 320; In re Laird (C. C. A. 6th Cir.), 109 Fed. Rep. 550, 48 C. C. A. 538, 6 Am. B. R. 1; In re Worcester Co. (C. C. A. 1st Cir.), 102 Fed. Rep. 808, 42 C. C. A. 637, 4 Am. B. R. 496; In re Crow, 116 Fed. Rep. 110, 7 Am. B. R. 545; In re Daniels, 110 Fed. Rep. 745, 6 Am. B. R. 699; In re Lewis, 99 Fed. Rep. 935, 4 Am. B. R. 51; In re Jones, 151 Fed. Rep. 108, 18 Am. B. R. 206; In re Beaver Coal Co., 107 Fed. Rep. 98, 5 Am. B. R.

787; In re Goldberg, 144 Fed. Rep. 566, 16 Am. B. R. 521; In re Byrne, 97 Fed. Rep. 792, 3 Am. B. R. 268; In re Falls City Mfg. Co., 98 Fed. Rep. 592, 3 Am. B. R. 437.

Where the priority is given in the settlement of a partnership no priority will be given in administration of the estate of one of the partners in bankruptcy. *In re* Daniels, 110 Fed. Rep. 745, 6 Am. B. R. 699.

<sup>28</sup> Where a state law as a condition to allowing a foreign corporation to do business within the state provides for priority to *creditors within the state*, on distribution of assets this priority will be recognized in bankruptcy. While the Federal Act superseded all state laws, yet this rule relates merely to the administration of the state laws in proceedings in the state courts, and does not prevent the enforcement in Federal bankruptcy proceedings of general priorities

To be entitled to priority given by the state law, a claimant must bring his claim within the provisions of the state statute.<sup>28\*</sup>

An act regulating assignments for creditors is held to govern priorities where it is the only insolvency system in the state.<sup>29</sup> If the state statute gives not a priority, but a lien, and the lien is dissolved by the bankruptcy proceedings, the lienor is entitled to no priority.<sup>30</sup>

Where the priority given by the state law was to claims for compensation and for expenses incurred by an assignee in insolvency, a doubtful question arose when the assignment was set aside by the bringing of bankruptcy proceedings within four months. It was held that such a general assignment was in fraud of the bankrupt act and therefore such debts were not only not entitled to priority, but were not even provable claims. This doctrine was repudiated by the supreme court in Randolph v. Scruggs, 2 and it is now settled that an assignee or his attorney are entitled to compensation for services rendered either before or after the filing of the petition, if the services rendered were beneficial to the estate, and this claim is entitled to priority. 3

Costs and sheriff fees incurred in an attachment proceeding within four months of bankruptcy, which is avoided by

recognized by state laws. In re Standard Oak Veneer Co., 173 Fed. Rep. 103, 22 Am. B. R. 883.

<sup>28\*</sup> In re Stark-Ullman Saddlery Co. (C. C. A. 6th Cir.), 171 Fed. Rep. 834, 96 C. C. A. 506, 22 Am. B. R. 596.

<sup>29</sup> In re Devlin, 180 Fed. Rep. 170, 24 Am. B. R. 863.

30 In re Allen, 96 Fed. Rep. 512,
 3 Am. B. R. 38; In re Young, 96
 Fed. Rep. 606, 2 Am. B. R. 673.

Stearns v. Flick, 103 Fed. Rep.
919, 4 Am. B. R. 723; In re Peter Paul Book Co., 104 Fed. Rep. 786,
5 Am. B. R. 105; Wilbur v. Watson,
111 Fed. Rep. 493, 7 Am. B. R. 54;

In re Tatum, 112 Fed. Rep. 50, 7
Am. B. R. 52; contra, In re Scholtz,
106 Fed. Rep. 834, 5 Am. B. R.
782.

<sup>32</sup> 190 U. S. 533, 47 L. Ed. 1165, - 10 Am. B. R. 1.

33 See Sec. 40, ante; Randolph v. Scruggs, 190 U. S. 533, 47 L. Ed. 1165, 10 Am. B. R. 1; In re Chase (C. C. A. 1st Cir.), 124 Fed. Rep. 753, 59 C. C. A. 629, 13 Am. B. R. 677; Summers v. Abbott (C. C. A. 8th Cir.), 122 Fed. Rep. 36, 58 C. C. A. 352, 10 Am. B. R. 254; In re Pattee, 143 Fed. Rep. 994, 16 Am. B. R. 450.

section 67f, are not entitled to priority of payment, unless there is a provision in the state statute creating a lien in favor of such charges.<sup>34</sup> Where a lien exists under the state statute in favor of a sheriff or party for costs in such a proceeding it will be recognized in a court of bankruptcy.<sup>35</sup> as where a lien was created by attachment proceedings more than four months prior to bankruptcy.<sup>36</sup> The expenses of an attachment, avoided by bankruptcy, has been allowed, where the proceedings preserved the property to the benefit of the estate.<sup>37</sup>

# § 595. Priority of debts due the United States.

The United States is entitled to priority, although it does not prove its debt, irrespective of the form of indebt-edness.<sup>1</sup>

A surety on a bond given by a bankrupt to the United States who pays money due on such bond is subrogated to a like priority.<sup>2</sup> The surety on a bond of a depository for funds

34 In re Beaver Coal Co., 107 Fed. Rep. 98, 5 Am. B. R. 787; In re Copper King, 143 Fed. Rep. 649, 16 Am. B. R. 148; In re Young, 96 Fed. Rep. 606, 2 Am. B. R. 670; In re Allen, 96 Fed. Rep. 512, 3 Am. B. R. 38; In re Daniels, 110 Fed. Rep. 745, 6 Am. B. R. 699; In re Jennings, 8 Am. B. R. 358.

<sup>35</sup> In re I.ewis, 99 Fed. Rep. 935,
4 Am. B. R. 51; In re Goldberg
& Bros., 144 Fed. Rep. 566, 16 Am.
B. R. 521; In re Iroquois Mach. Co.,
166 Fed. Rep. 629, 22 Am. B. R. 183.
<sup>36</sup> In re Beaver Coal Co. (C. C.
A. 9th Cir.), 113 Fed. Rep. 889, 51
C. C. A. 519, 7 Am. B. R. 542,

affirming 110 Fed. Rep. 630, 6 Am. B. R. 404.

<sup>37</sup> In re Heller, 176 Fed. Rep. 656,
 23 Am. B. R. 792; Staake v. Watts
 (C. C. A. 4th Cir.), 133 Fed. Rep.

717, 66 C. C. A. 547, 13 Am. B. R. 281.

<sup>1</sup> R. S. Sec. 3466; B. A. 1898, Sec. 64b, clause 5; Title Guaranty & Surety Co. v. Guarantee Title & Trust Co. (C. C. A. 3d Cir.), 174 Fed. Rep. 385, 98 C. C. A. 603, 23 Am. B. R. 340; In re Stoever, 127 Fed. Rep. 394, 11 Am. B. R. 345; Lewis v. United States, 92 U. S. 618, 23 L Fd. 513; United States v. Herron, 20 Wall. 251, 22 L. Ed. 275; In re Vetterlein, 20 Fed. Rep. 109; Harrison v. Sterry, 5 Cranch. 289, 3 L. Ed. 104. See also United States v. Murphy, 15 Fed. Rep. 589, and collation of cases in note at end of the opinion,

<sup>2</sup> R. S. Sec. 3468; Title Guaranty & Surety Co. v. Guarantee Title & Trust Co. (C. C. A. 3d Cir.), 174 Fed. Rep. 385, 98 C. C. A. 603, 23 Am. B. R. 340,

of a receiver or trustee in bankruptcy is not entitled to priority in distribution of the assets of the depository.<sup>8</sup>

Where a person purchases an article duty free, and is compelled to pay the duty in order to get possession of the property, he is entitled to be subrogated to the right of the United States to priority, although he proves his debt as unsecured.<sup>4</sup>

Where a revenue officer has paid a dishonored check, received by him from a government debtor, he is entitled to be subrogated to the rights of the United States against such debtor.<sup>5</sup>

Where the United States has obtained a judgment against persons composing a bankrupt firm, though for a debt on which one of the partners was liable as principal and the other as surety, they are entitled to priority over all partnership creditors. A judgment for an internal revenue penalty recovered after the adjudication in bankruptcy is entitled to priority of payment.

Debts owing to the United States, a state, a county, a district, or a municipality as a penalty or forfeiture are allowed only for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law.<sup>8</sup> Hence the priority of the United States is limited in respect to what may be allowed.

<sup>8</sup> American Surety Co. v. Akron Sav. Bank, 170 O. C. C. 516, affirmed, without opinion, 74 O. St. 465, affirmed, without opinion, 212 U. S. 557, 53 L. Ed. 651.

\* In re Kirkland, No. 7844 Fed. Cas., 14 N. B. R. 157.

<sup>5</sup> In re McBride, No. 8662 Fed. Cas., 19 N. B. R. 452.

<sup>6</sup> In re Strassburger, No. 13526 Fed. Cas., 4 Woods, 557.

<sup>7</sup> In re Rosey, No. 12066 Fed. Cas., 6 Ben. 507.

<sup>8</sup> B. A. 1898, Sec. 57*i*. As to when a penalty may be allowed as interest, see *In re* Scheidt, 177 Fed Rep. 199, 23 Am. B. R. 778; *In re* Kallak, 147 Fed. Rep. 276, 17 Am. B. R. 414.

#### CHAPTER XXX.

#### DISTRIBUTION AND SETTLEMENT OF THE ESTATE.

SEC.		SEC.		
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## § 596. Care of funds.

The trustee collects and reduces to money the property of the estate for which he is trustee, under the direction of the court, and is required to account for and pay over to such estate all interest received by him upon the property of the estate.<sup>1</sup>

The money so collected is deposited in one of the designated depositories.<sup>2</sup> This constitutes the fund to be distributed. It should be deposited in the name of the court or judge <sup>3</sup> or to the credit of the trustee, naming the estate,<sup>4</sup> and should not be withdrawn on check signed by the referee only, but only when such check is countersigned by the judge or some one designated by him.<sup>5</sup>

The state court which has raised funds by its own process may have a right to distribute them.<sup>6</sup>

- <sup>1</sup> B. A. 1898, Sec. 47, clauses 1 and 2.
  - <sup>2</sup> See Secs. 358, et seq., ante.
- <sup>3</sup> In re Cobb, 112 Fed. Rep. 655, 7 Am. B. R. 202.
- <sup>4</sup> In re Carr, 117 Fed. Rep. 572, 9 Am. B. R. 58.
- In re Cobb, 112 Fed. Rep. 655,
   Am. B. R. 202; Gen. Ord. 29.
   See also In re Rude, 101 Fed. Rep. 805, 4 Am. B. R. 319.
- <sup>6</sup> Dyson v. Harper, 54 Ga. 282, on levy.
- Furth v. Stahl, 205 Pa. 439, 55 A. 29, foreclosure.

# § 597. Who are entitled to share in the estate.

All creditors whose debts are duly proved and allowed are entitled to share in the bankrupt's estate.

Secured creditors are entitled to be paid to the extent of their security.¹ Creditors having priority are entitled to be paid in full.² The general creditors share *pro rata*. The firm creditors must look to the firm property and the individual creditors must look to the individual estates in partner-ship cases.³

Who are entitled to participate in the distribution of property recovered by the trustee under a state law is determined by the bankrupt law and not by the state law.<sup>3\*</sup>

There is no provision in the statute for paying dividends to the general creditors who have not proved their claims, but a creditor who received an innocent preference and refused to surrender it has been held entitled to the surplus of the bankrupt's estate, not exceeding the balance due on his debt, after the other creditors have been paid in full. 9

The creditors' rights are fixed by the status of their claims at the beginning of the proceedings. 10

The persons entitled to share in a particular dividend are such only as have proved their debts prior to its being declared by the referee. A creditor is not entitled to have his debt brought in for a dividend if not proved until after the order declaring the dividend is made. This construction of the act is the only one that can give bearing and consistency to the proceedings. If additional debts may be brought into the computation after the referee has prepared his list of claims and dividends it would be subject to incessant fluctuations and renewals; and what would render it

<sup>&</sup>lt;sup>1</sup> See Sec. 594, post.

<sup>&</sup>lt;sup>2</sup> See Sec. 593, post.

<sup>&</sup>lt;sup>8</sup> As to distribution of partnership estates, see Sec. 358; et seq., ante.

<sup>\*\*</sup> Miller v. New Orleans Fertillizer Co., 211 U. S. 496, 53 L. Ed. 300, 21 Am. B. R. 416;

See Sec. 328, ante; In re Hoyt,
 No. 6808 Fed. Cas., 3 N. B. R. 55.

<sup>&</sup>lt;sup>9</sup> In re Morton, 118 Fed. Rep. 908, 9 Am. B. R. 508.

<sup>&</sup>lt;sup>10</sup> Section 290, ante. In re Reading Hosiery Co., 171 Fed. Rep. 195, 22 Am. B R. 562.

<sup>&</sup>lt;sup>11</sup> B. A. 1898, Sec. 65c; In re Stein, 94 Fed. Rep. 124, 1 Am. B. R. 662; In re Miller, No. 9556 Fed. Cas., 1 N. Y. Leg. Obs. 180.

still more inconvenient and unequal in practice would be that even after the trustee had paid dividends under the rate to a part of the creditors, others might come in and arrest payments in progress to the residue, and, by presenting from day to day a new basis of distribution, dwindle down the *per centum* first established, and place those creditors to whom it was declared on a scale constantly descending in proportions. This would be in direct conflict with the evident intent of the statute.<sup>12</sup>

The claims of persons contingently liable for the bankrupt may be proved in the name of the creditor, when known, by the party contingently liable. When the name of the creditor is unknown such claim may be proved in the name of the party contingently liable; but no dividend is paid upon such claim, except upon satisfactory proof that it will diminish *pro tanto* the original debt.<sup>13</sup>

Where a person is adjudged a bankrupt in the United States and also in a foreign country, the creditors in this country are entitled to a dividend equal to that received in the foreign court by other creditors before creditors who have received a dividend in such court shall be paid any amount. 13\*

# § 598. Reports.

The trustee is required to report to the court, the judge or referee, in writing, the condition of the estate and the amounts of money on hand, and such other details as may be required by the court, within the first month after his appointment and every two months thereafter, unless otherwise ordered by the court.<sup>14</sup>

All accounts of the trustee are referred, as of course, to the referee for orders, unless otherwise specially ordered by the court.<sup>15</sup>

<sup>12</sup> B. A. 1898, Secs. 65a and 65c; In re Stein, 94 Fed. Rep. 124, 1 Am. B. R. 662.

<sup>13</sup> General Ord. 21, par. 4. B. A. 1898, Sec. 65*e*; *In re* Dillon, 100 Fed. Rep. 627, 4 Am. B. R. 63.

13\* B. A. 1898, Sec. 65d.

<sup>14</sup> B. A. 1898, Sec. 47, clause 10; Gen. Ord. 17.

15 General Ord, 17.

# § 599. Declaration and payment of dividends.

The referee keeps a record of the claims which have been proved and allowed, and declares all dividends and prepares and delivers to the trustee dividend sheets showing the dividends declared and to whom payable.16

The referee fixes and determines the rate of the dividend as well as makes the computation and calculations as to the amounts. The data for such calculations is in his possession; namely, the names of the creditors and the amount of each debt proved and allowed. The trustee is required to report to him, in writing, the condition of the estate and the amount of money on hand, and such details as may be required by the court.17

Having determined upon the rate per centum, the referee prepares a list of debts, proved and allowed, stating the rate of dividend and the name of each creditor, alphabetically arranged, together with the sum proved and allowed and the amount of the dividend to be paid thereon. 18 This list of claims and dividends should be included by the referee in his record, and a copy delivered by him to the trustee. is the authority for the trustee to make payments of dividends as set forth in such list.

The dividends are of an equal per centum, and are declared and paid on all allowed claims except such as have priority or are secured.<sup>19</sup> Where only one creditor has proved his claim he is entitled to be paid in full if there be enough for that purpose; if there be not enough he takes the whole.20

The rights of creditors, who have received dividends, or in' whose favor final dividends have been declared, are not

<sup>16</sup> B. A. 1898, Sec. 39, clause 1; Official Form No. 40; see Form No. 98. post.

<sup>17</sup> B. A. 1898, Sec. 47, clause 10; Gen. Ord. 17.

<sup>18</sup> Official Form No. 40; see Form No. 98, post.

<sup>19</sup> B. A. 1898, Sec. 65a.

<sup>&</sup>lt;sup>20</sup> In re Haynes, No. 6269 Fed. Cas., 2 N. B. R. 227; In re James, No. 7175 Fed. Cas., 2 N. B. R. 227.

affected by the proof and allowance of claims subsequent to the date of such payment or declarations of dividends; but the creditors proving and securing the allowance of such claims are paid dividends equal in amount to those already received by the other creditors if the estate equals so much before such other creditors are paid any further dividends.<sup>21</sup>

The first dividend should be declared within thirty days after the adjudication, if the money of the estate in excess of the amount necessary to pay the debs which have priority, and such claims as have not been but probably will be allowed, equals five *per centum* or more of such allowed claims.<sup>22</sup>

The first dividend must not include more than 50% of the money of the estate in excess of the amount necessary to pay the debts which have priority and with claims as will probably be allowed.<sup>23</sup>

The trustee is required to pay dividends within ten days after they are declared by the referee. The trustee receives the list of claims and dividends prepared by the referee, and forthwith serves a notice 25 upon the creditors whose names are included in this list, of the time and place where payment of the dividends will be made. The creditors are entitled to have at least ten days' notice, by mail to their respective addresses, unless they waive notice in writing, of the declaration and time of payment of the dividends. 26

An order disallowing a payment made by the trustee in violation of law is final unless appealed from and can not be set aside on motion.<sup>27</sup>

<sup>&</sup>lt;sup>21</sup> B. A. 1898, Sec. 65c; In re Hovey, 5 Fed. Rep. 356, affirmed, 8 Fed. Rep. 314. As to when domestic creditors are preferred in paying dividends to foreign creditors, see B. A. 1898, Sec. 65d.

<sup>&</sup>lt;sup>22</sup> B. A. 1898, Sec. 65*b*, as amended Feb. 5, 1903, 32 Stat. at L. 797.

<sup>&</sup>lt;sup>23</sup> B. A. 1898, Sec. 65*b*, as amended Feb. 5, 1903, 32 Stat. at L. 797.

 <sup>24</sup> B. A. 1898, Sec. 47, clause 9.
 25 Official Form No. 41; see Form No. 99, post.

<sup>&</sup>lt;sup>26</sup> B. A. 1898, Sec. 58a.

<sup>&</sup>lt;sup>27</sup> In re Hoyt & Mitchell, 127 Fed. 968, 11 Am. B. R. 784.

The creditors may, either personally or by some person authorized in writing,<sup>28</sup> obtain such dividends from the trustee at the time and place mentioned in the notice. Where payments are made to attorneys it should clearly appear on whose account the payment is made.<sup>29</sup> Each dividend is paid by a check or warrant drawn upon the designated depository in which the fund is deposited.<sup>30</sup>

The warrant or check must be signed by the clerk of the court or by the trustee, and countersigned by the judge of the court, or by a referee designated for that purpose, or by the clerk or his assistant under an order made by the judge, stating the date, the time, and the account for which it is drawn.<sup>31</sup> The warrant is usually drawn by the trustee and countersigned by the referee. An entry of the substance of such check or warrant, with the date thereof, the sum drawn for, and the account for which it is drawn, must be forthwith made in a book kept for that purpose by the trustee or his clerk; and all checks and drafts should be entered in the order of time in which they are drawn, and numbered in the case of each estate.<sup>32</sup> The creditor receiving the check is required by the trustee to sign a voucher to be used in making up his accounts.

Dividends subsequent to the first are declared upon like terms as the first and as often as the amount equals ten per centum or more and upon closing the estate. Dividends may be declared oftener and in smaller proportions if the judge shall so order. It is not necessary before declaring a final dividend to wait a year—the time within which claims

<sup>&</sup>lt;sup>28</sup> See creditor's letter to trustee in Official Form No. 41; see Form No. 99, post.

 <sup>&</sup>lt;sup>29</sup> In re Carr, 116 Fed. Rep. 556,
 8 Am. B. R. 635.

 <sup>30</sup> B. A. 1898, Sec. 47, clause 4.
 31 General Ord. 29. In re Cobb,
 112 Fed. Rep. 655, 7 Am. B. R. 202;

see also *In re* Rude, 101 Fed. Rep. 805, 4 Am. B. R. 319; *In re* Clark, No. 2810 Fed. Cas., 9 N. B. R. 67.

<sup>32</sup> General Ord. 29.

<sup>&</sup>lt;sup>33</sup> B. A. 1898, Sec. 65*b*, as amended by the act of Feb. 5, 1903, 32 Stat. at L. 797.

may be proved, but the final dividend can not be declared within three months after the first dividend.33\*

It may be observed that there is considerable difference between the method of distribution under this act and that pursued under act of 1867. The principal point of difference is that the referee declares the dividends under the present statute instead of the creditors; as was done under the former act.<sup>34</sup>

A claimed indebtedness from one creditor of a bankrupt to another, growing out of transactions not connected with the bankruptcy proceedings, can not be litigated in such proceedings or adjusted in the distribution of dividends:<sup>85</sup>

Where a person has recovered a judgment, which is pending review in an appellate court, the court of bankruptcy will see to it that no dividends are paid until the case is disposed of by the appellate court. It will then be ordered to be paid or expunged, or ordered suspended, as shall be indicated by the judgment of the appellate court. The proceedings in bankruptcy may go on in the usual way to their final orderly termination. If the judgment creditor shall not, in the meantime, have succeeded in getting his debt in a condition to receive dividends upon it, he will not be able to participate in the distribution of the estate as a judgment creditor.

Where an order is entered, by the consent of all known creditors, for a distribution different from that provided by the bankrupt act it is subject to the rights of any unknown creditors who appear within the time allowed by the act.<sup>37</sup>

# § 600. No interest on dividends.

Where a claim has been honestly and fairly disputed and the claimant finally prevails, interest upon the dividends

<sup>&</sup>lt;sup>33\*</sup> In re Stein, 94 Fed. Rep. 124, 1 Am. B. R. 662; B. A. 1898, Sec. 65b, as amended Feb. 5, 1903, 32 Stat. at L. 797.

<sup>84</sup> R. S. Secs. 5092 and 5093.

 <sup>&</sup>lt;sup>85</sup> In re Girard Glazed Kid Co.,
 136 Fed. Rep. 511, 14 Am. B. R.
 485. See post, Sec. 587.

<sup>&</sup>lt;sup>36</sup> In re Sheehan, No. 12737 Fed.
Cas., 8 N. B. R. 345; In re Yates,
114 Fed. Rep. 365, 8 Am. B. R.
69.

<sup>&</sup>lt;sup>87</sup> In re Lockwood, 104 Fed. Rep. 794, 4 Am. B. R. 731.

should not be allowed from the time that like dividends were declared upon undisputed claims.<sup>38</sup> Interest may be allowed on all claims from the date of filing the petition if the bankrupt's estate is sufficient to pay the same to all.<sup>39</sup>

## § 601. Dividends are not subject to attachment.

A dividend in the hands of the trustee can not be reached by attachment or on any process from a state court.<sup>40</sup> The same rule holds in cases of money payable under a composition with creditors.<sup>41</sup>

The reason for this rule is that while the funds are in the hands of the trustee they are a part of the estate of the bankrupt in the custody of the court. Such money is not the property of the debtor, but is property only which becomes his, when he actually gets it. He can not maintain any suit against the trustee for it, nor obtain it by any legal process other than an application to the court of bankruptcy having control of the

38 In Hersey, et al., v. Fosdick, 20 Fed. Rep. 44, Judge Lowell, in considering this question, said: can see no reason why, because a creditor finally prevails in a claim honestly and fairly disputed by the assignees, he should have more than his dividend. Not, surely, as damages for withholding something due him, for there is nothing due him in bankruptcy until his debt, both as to its legality and its amount, has been ascertained. Not as a matter of contract, for there is no contractual relation between the parties. I am confident that the practice has always been against it, and -that it is both just and expedient that the general creditors should be at liberty to investigate doubtful claims, without the liability to such a penalty as would be imposed upon them by granting the petition. I do not say that if funds have been set aside to meet a large claim of this kind, and have earned interest, the court has not power to order the precise amount of interest so earned on a sum which proves to be the creditor's money, to be paid to him."

But see *In re* Kitzinger, No. 7862 Fed. Cas., 19 N. B. R. 238, and No. 7863 Fed. Cas., 19 N. B. R. 307.

<sup>39</sup> In re Hagan, No. 5898 Fed.
 Cas., 6 Ben. 407; In re Town, No. 14112 Fed. Cas., 8 N. B. R. 40.

40 In re Argonaut Shoe Co., (C. C. A. 9th, Cir.) 187 Fed. Rep. 784, 109 C. C. A.—26 Am. B. R. 584. Cowart v. Caldwall Co., 134 Ga. 544, 68 S. E. 500; In re Chisholm, 4 Fed. Rep. 526; Gilbert v. Quinby, 1 Fed. Rep. 111; In re Cunningham, No. 3478 Fed. Cas., 19 N. B. R. 276; In re Kohlsaat, No. 7918 Fed. Cas., 18 N. B. R. 570; In re Bridgman, No. 1867 Fed. Cas., 2 N. B. R. 252; Colby v. Coates, 6 Cush. (Mass.) 558.

<sup>41</sup> In re Kohlsaat, No. 7918 Fed. Cas., 18 N. B. R. 570.

funds, as a party to the proceedings in that court. The situation is very similar to that of money in the hands of a public officer due to a private person, and the familiar cases relating to the exemption of such funds from attachment, to prevent them from passing to the person who claims them, may be profitably consulted.<sup>42</sup>

#### § 602. Unclaimed dividends.

There was a conflict of opinion under the former act as to what disposition should be made of the balance that remained after the payment of all the creditors, who had proved their debts in case there were names of creditors on the schedule who had not proved their debts. Some judges held that it should be distributed among the creditors holding unproved claims.<sup>43</sup> Other judges held that it should be paid to the bankrupt.<sup>44</sup>

This question can not be mooted under the present act, which expressly provides that dividends which remain unclaimed for six months after the final dividend has been declared shall be paid by the trustee into court.<sup>45</sup>

Dividends remaining unclaimed for one year shall, under the direction of the court, be distributed to the creditors whose claims have been allowed but not paid in full, and after such claims have been paid in full the balance shall be paid to the bankrupt. Provided, that in case unclaimed dividends belong to minors, such minors may have one year after arriving at majority to claim such dividends.<sup>45</sup>

42 Buchanan v. Alexander, 4 How. 20, 11 L. Ed. 857; McLaughlin v. Swann, 18 How. 217, 15 L. Ed. 357; Providence & Stonington Steamship Co. v. Ins. Co., 11 Fed. Rep. 284; Clarke v. Shaw, 28 Fed. Rep. 356; Van Brocklin v. Tennessee, 117 U. S. 151, 29 L. Ed. 845; Foley v. Shriver, 81 Va. 568; Roeller v. Ames, 33 Minn. 132; Gassett v. Grout, 4 Met. (Mass.) 486.

48 In re Haynes, No. 6269 Fed.

Cas., 2 N. B. R. 227; In re James, No. 7175 Fed. Cas., 2 N. B. R. 227.

44 In re Hoyt, No. 6806 Fed. Cas., 3 N. B. R. 55; Steevens v. Earles, 25 Mich. 40; In re Blight's Estate, No. 1540 Fed. Cas., 1 Pa. Law J. 225, it was held that unclaimed dividends would not be awarded to a bankrupt's administrator when opposed by creditors whose claims were not paid in full.

45 B. A. 1898, Sec. 66.

## § 603. The settlement of the estate.

When the trustee has realized all the property of the bankrupt, or so much thereof as can be realized, or where no tangible assets have come into his hands and he has no information of any property belonging to the bankrupt, and the estate has been distributed or is in shape for a final dividend, the estate is ripe for settlement.

The final dividend may be declared before the time limited for proving claims has expired, 46 but not within three months after the first dividend shall be declared. 47 The trustee thereupon makes a final report and files his final accounts under oath with the referee. 47\* This should be done at least fifteen days before the day fixed for the final meeting of the creditors. 48

The referee should thereupon give at least ten days' notice by mail to the creditors, at their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case, unless they waive notice in writing, of the filing of the final accounts of the trustee and the time when and the place where they will be examined and passed upon.<sup>49</sup>

Whenever the affairs of the estate are ready to be closed a final meeting of creditors must be ordered.<sup>50</sup> But if no trustee is appointed, the court may order that no meeting of the creditors other than the first meeting shall be called.<sup>51</sup>

Upon the day fixed for the final meeting the creditors assemble pursuant to notice. The trustee is required to lay before this meeting of the creditors detailed statements of

<sup>46</sup> In re Stein, 94 Fed. Rep. 124, 1 Am. B. R. 662.

<sup>47</sup> B. A. 1898, Sec. 65b; In re Eldred, 155 Fed. 686, 19 Am. B. R. 52; In re Bell Piano Co., 155 Fed. 272, 18 Am. B. R. 183, the final dividend may be declared after three months from the time of the first dividend, notwithstanding the failure of scheduled creditors to prove their debts.

47\* Official Forms Nos. 49 and 50; see Forms Nos. 93 and 94, post. If there are no assets, the trustee makes his return in Official Form No. 48; see Form No. 92, post.

<sup>48</sup> B. A. 1898, Sec. 47, clause 8.

<sup>49</sup> B. A. 1898, Sec. 58a, as amended June 25, 1910. *In re* Savage, 12 Fed. Rep. 719.

50 B. A. 1898, Sec. 55f.

51 General Ord. 15.

the administration of the estate.<sup>51\*</sup> These statements and accounts are examined at this time, and such other business as may be necessary to the final settlement of the affairs of the bankrupt may be transacted. The creditors may, by vote at the final meeting, dispense with the reading and exhibition of the trustee's accounts and vouchers, where they have been on file for a reasonable time.<sup>52</sup> The referee audits the account, and, if regular and proper, passes an order allowing the account and discharging the trustee.<sup>53</sup> If objections are made to the accounts the referee should hear them and determine the merits as soon as he conveniently can do so. No objection should be allowed after a distribution has been confirmed.<sup>54</sup> The meeting may be adjourned with leave to the trustee to correct his errors or omissions.<sup>55</sup>

# § 604. The record of the referee to be transmitted to the court.

When the debts have been proved and allowed, the assets collected and distributed, the trustee's accounts audited and the trustee discharged, the case is concluded before the referee. He should then certify to a record of the proceedings before him, together with such papers as are on file before him, and transmit them to the clerk of the court. They are preserved by the clerk as a part of the records of the court.

Certified copies of such proceedings or of such papers, when issued by the clerk or referee, are to be admitted as evidence with like force and effect as certified copies of the records of district courts of the United States are now and

 <sup>51\*</sup> B. A. 1898, Sec. 47a (7).
 52 In re Merchants Ins. Co., No.
 9442 Fed. Cas., 6 Biss. 252.

<sup>&</sup>lt;sup>58</sup> Official Form No. 51; see Form No. 95, post.

<sup>&</sup>lt;sup>54</sup> In re Heebner, 132 Fed. Rep. 1003, 13 Am. B. R. 256.

<sup>&</sup>lt;sup>65</sup> In re Savage, 12 Fed. Rep. 719.
<sup>56</sup> B. A. 1898, Sec. 42c; Cook Inlet Coal Field Co. v. Caldwell (C. C. A. 4th Cir.), 147 Fed. Rep. 475, 78 C. C. A. 17, 17 Am. B. R. 135.

may hereafter be admitted as evidence. The referee can furnish certified copies only when the papers are in his possession, and not after his record has been filed with the clerk.

#### § 605. Reopening a case.

The statute expressly authorizes the court to reopen estates whenever it appears that they were closed before being fully administered.<sup>57</sup> This may be done upon a showing made ex parte.<sup>59</sup>

The court may vacate an order of the referee discharging the trustee. 60

The estate may be reopened by the referee, 62 though the record has been returned to court. 63 Whether a proper case is made for reopening an estate rests in the sound discretion of the court. 64

There is no time limit within which an estate may be reopened but the doctrine of laches is applicable where an unreasonable delay has intervened.<sup>64\*</sup>

<sup>57</sup> B. A. 1898, Sec. 2, clause 8;
In re Barton's Estate, 144 Fed.
Rep. 540, 16 Am. B. R. 569; In re
Ryburn, 145 Fed. Rep. 662, 16 Am.
B. R. 514; Traub v. Marshall Field
& Co. (C. C. A. 5th Cir.), 186 Fed.
Rep. 622, 109 C. C. A.—; 25 Am.
B. R. 410.

Where, for example, a petition as first filed showed no assets and no claims were proved and no trustee was appointed but the estate was closed and the bankrupt received his discharge on the discovery of new assets, the court allowed creditors, one year from the date of reopening the case to prove their claims. *In re* Pierson, 174 Fed. Rep. 160, 23 Am. B. R. 58.

<sup>59</sup> In re Ryburn, 145 Fed. Rep. 662, 16 Am. B. R. 514.

60 Brown v. Persons (C. C. A. 3d Cir.), 122 Fed. Rep. 212, 58 C. C. A. 658, 10 Am. B. R. 416.

<sup>62</sup> In re Sonnabend, 18 Am. B. R. 117.

<sup>63</sup> Bilafsky v. Abraham, 183 Mass. 401*b*.

64 In re O'Connell (C. C. A. 1st Cir.), 137 Fed. Rep. 838, 70 C. C. A. 336, 14 Am. B. R. 237; In re Newton (C. C. A. 8th Cir.), 107 Fed. Rep. 429, 46 C. C. A. 399, 6 Am. B. R. 52; Traub v. Marshall Field & Co. (C. C. A. 5th Cir.), 186 Fed. Rep. 622, 109 C. C. A. —;25 Am. B. R. 410. 64\* Traub v. Marshall Field & Co. (C. C. A. 5th Cir.), 186 Fed. Rep. 622, 109 C. C. A. 5th Cir.), 186 Fed. Rep. 622, 109 C. C. A. —; 25 Am. B. R. 410. Vary v. Jackson (C. C. A. 5th Cir.), 164 Fed. Rep. 840, 90 C. C.

A. 602. 21 Am. B. R. 334.

After an order reopening an estate is made the creditors should elect a new trustee at their first meeting.<sup>65</sup> The new trustee, upon his qualification, is vested by operation of law with the title of the bankrupt as of the date he was adjudged bankrupt the same as the original trustee.<sup>66</sup> He has the same power to recover property which has been concealed or transferred as the original trustee. After a case has been reopened the administration of the newly acquired assets is made in the same way as if there had been no closing of the estate.

# § 606. Where petition in bankruptcy is dismissed.

Where the petition in bankruptcy is dismissed the bankruptcy court as a court of equity should preserve the property and pay it over to persons entitled, deducting the expenses incurred, and need not simply return it to the bankrupt.<sup>67</sup>

65 B. A. 1898, Sec. 44; In re Newton (C. C. A. 8th Cir.), 107 Fed. Rep. 429, 46 C. C. A. 399, 6 Am. B. R. 52; Fowler v. Jenks, 90 Minn. 74, 11 Am. B. R. 225.

66 B. A. 1898, Sec. 70a.

<sup>67</sup> In re De Lancey Stables Co., 170 Fed. 860, 22 Am. B. R. 406. See In re Lacov (C. C. A. 2d Cir.), 142 Fed. 960, 74 C. C. A. 130, 15 Am. B.

R. 290, petitioning creditors are bound to pay the receiver's expenses where the petition is dismissed, and this liability may be enforced by proceedings in contempt. Cf. however, In re John L. Nelson & Bro. Co., 149 Fed. 590, 18 Am. B. R. 66, to the effect that in turning over property the court has no power to grant priorities.

#### CHAPTER XXXI.

#### EXAMINATION.

620.

How an examination is made.

ovo.	when a bankrupt may be examined.	021.	Objections—record.
609.	When persons other than a bank- rupt may be examined.	622.	Assistance of counsel to person examined.
610.		623.	Depositions.
	state law.	624.	Upon what topics the bankrup
611.	Where examination may take place,		may be examined.
612.	How to obtain an examination.	625.	Incriminating evidence.
613.	Detaining bankrupt for examination.	626.	For malice or curiosity.
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615.	Extradition-ancillary jurisdiction		than bankrupt may be examined
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617.	Notice to creditors.		answer.
618.	Summons to persons not parties.	629.	When testimony may be used in
619.	Witness fees.		subsequent proceedings.

## § 607. Who entitled to examine.

Who entitled to examine.

sec. 607.

The application for an order requiring the bankrupt or other person to appear for examination may be made by any officer, bankrupt or creditor.<sup>1</sup> A receiver <sup>2</sup> or a trustee <sup>3</sup> are such officers.

The referee should be satisfied that the party applying for the order is in fact a creditor of the bankrupt. It is sufficient if the party is named in the schedules attached to the petition in bankruptcy <sup>4</sup> before he has filed proof of his claim in set form.<sup>5</sup> The bankrupt can not refuse to be sworn by reason of his claiming that he has an offset which extinguishes, or

<sup>1</sup> B. A. 1898, Sec. 21.

<sup>2</sup> In re Fixen, 96 Fed. Rep. 748, 2 Am. B. R. 822.

3 In re Howard, 95 Fed. Rep. 415,2 Am. B. R. 582.

<sup>4</sup> In re Jehu, 94 Fed. Rep. 638, 2 Am. B. R. 498.

<sup>5</sup> In re Samuelsohn, 174 Fed. Rep.
911, 23 Am. B. R. 528; In re Jehu,
94 Fed. Rep. 638, 2 Am. B. R. 496;
In re Walker, 96 Fed. Rep. 550, 3

Am. B. R. 36; In re Price, 91 Fed. Rep. 635, 1 Am. B. R. 419; In re Kuffler, 153 Fed. Rep. 667, 18 Am. B. R. 587; although the claim is not filed and the bankrupt claims the debt is barred by limitations the creditor may still examine to ascertain whether he will take an active part in the proceedings; In re Rose, 163 Fed. Rep. 636, 19 Am. B. R. 169.

that the statute of limitations has run against the claim of the creditor upon whose application he is to be examined.<sup>6</sup>

And the creditor's right to examine is not abridged by the fact that the trustee alleged the conveyance to be a preference under which the creditor is claiming.<sup>7</sup> So long as the debt stands proved and unimpeached the bankrupt may be sworn and examined.<sup>8</sup>

# § 608. When a bankrupt may be examined.

The bankrupt may be examined when he is present at the first meeting of his creditors and at such other times as the court shall order.<sup>9</sup> The order referring a case to a referee must name a day upon which the bankrupt shall attend before the referee.<sup>10</sup> For convenience the same day is usually selected as that upon which the first creditors' meeting is held. The first examination is regularly made at the first creditors' meeting.

A bankrupt may be examined as many times as the judge or referee shall order. The fact that one creditor has examined the bankrupt is no reason for withholding the privilege from another creditor. The referee should, in the exercise of a sound discretion, so regulate the time, manner and courses of examination as to protect the bankrupt from annoyance, and oppression, and mere delay. At the same time full and fair opportunity should be allowed to the creditors to inquire into such matters as the statute

<sup>6</sup> In re Kuffler, 153 Fed. Rep. 667, 18 Am. B. R. 587.

<sup>7</sup> In re Samuelsohn, 174 Fed. Rep. 911, 23 Am. B. R. 528.

<sup>8</sup> In re Kingsley, No. 7818 Fed. Cas., 6 Ben. 300; In re Winship, No. 17878 Fed. Cas., 7 Ben. 194; In re Howard, 95 Fed. Rep. 415, 2 Am. B. R. 582.

An examination was allowed when the creditors' claims had been proved and protest filed against them. *In re* Belden, No. 1241 Fed. Cas., 4 N. B. R. 194; *In re* Scott, 95 Fed. Rep. 815, 1 Am. B. R. 49,

it was held that a witness was bound to take the oath although not bound to answer incriminating questions.

<sup>9</sup> B. A. 1898, Sec. 7, clause 9. Compare R. S. Sec. 5086.

<sup>10</sup> General Ord. 12. B. A. 1898, Sec. 55b.

<sup>11</sup> In re Price, 91 Fed. Rep. 635, 1 Am. B. R. 419; In re Mellin, 97 Fed. Rep. 326, 3 Am. B. R. 226; In re Adams, No. 40 Fed. Cas., s. c. 3 Ben. 7; In re Gilbert, No. 5410 Fed. Cas., 1 Low. 340; In re Vogel, No. 16984 Fed. Cas., 5 N. B. R. 393.

permits.<sup>12</sup> Where one full examination of the bankrupt has been made, a subsequent examination will not ordinarily be permitted except for cause.<sup>13</sup>

It has been held that the bankrupt can not be examined under section 21a until after the adjudication, because his estate is not "in process of administration" prior to that time.14 The better rule is that the court has power to direct the examination of the bankrupt at any time after the petition is filed and before adjudication for cause shown.<sup>15</sup> The power of the court is plenary, prior to the adjudication, not only over the debtor's property but over his person. When the petition in bankruptcy is filed the estate of the bankrupt is brought into the custody of the court for administration. 15\* It is then in process of administration within the meaning of section 21a. It is not necessary that the court has taken any steps to actually administer it. Prior to an adjudication the court may seize the property under section 69 or put it in the hands of a receiver under section 2, clause 3. These are mere steps in the process of administration. In case of an application for a

12 In re Horgan (C. C. A. 2d
 Cir.), 98 Fed. Rep. 414, 39 C. C.
 A. 118, 3 Am. B. R. 253; In re Mellen, 97 Fed. Rep. 326, 3 Am. B. R. 226.

13 In re Frisbie, No. 5131 Fed.
Cas., 13 N. B. R. 349; In re Isidor,
No. 7105 Fed. Cas., 2 Ben. 123; In re Frizelle, No. 5153 Fed. Cas., 5
N. B. R. 122; In re Price, 91 Fed.
Rep. 635, 1 Am. B. R. 419.

14 Skubinsky v. Bodek (C. C. A. 3d Cir.), 172 Fed. Rep. 332, 97 C.
C. A. 116, 22 Am. B. R. 669 (Judge Buffington dissenting); In re Back Bay Automobile Co., 158 Fed. Rep. 679, 19 Am. B. R. 835; In re Crenshaw, 155 Fed. Rep. 271, 19 Am. B.
R. 266; In re Davidson, 158 Fed. Rep. 678, 19 Am. B. R. 833; In re Thompson, 179 Fed. Rep. 874, 24 Am. B. R. 655.

15 In re Fleischer, 151 Fed. Rep.
81, 18 Am. B. R. 194; In re Fixen,
96 Fed. Rep. 748, 2 Am. B. R. 822;
In re Knopf, 144 Fed. Rep. 245,
16 Am. B. R. 432.

See also Judge Buffington's dissenting opinion in Skubinsky v. Bodek (C. C. A. 3d Cir.), 172 Fed. Rep. 335, 97 C. C. A. 116, 22 Am. B. R. 669.

Examinations before adjudication were held under the act of 1841 (Ex parte Lee, Fed. Cas. No. 8178) and of 1867. In re Gilbert, Fed. Cas. No. 5410. See In re Salkey, Fed. Cas., No. 12252, holding that the power of the court is "plenary prior to the adjudication not only over the debtor's property, but over his person."

15\* As to the effect of filing petition, see Sec. 30, ante.

composition before an adjudication, the statute expressly requires an examination of the bankrupt and delays the adjudication until the matter of composition is determined.<sup>16</sup>

It will sometimes be necessary to determine at what stage in the proceedings does the right to examine the bankrupt cease. There can be no doubt that this right extends up to the final adjudication upon his application for a discharge.<sup>17</sup> The hearing upon a petition for a discharge may be continued for the purpose of affording an opportunity to examine the bankrupt in a proper case. 18 It has been held that a bankrupt can be compelled, after his discharge, to submit to an examination.19 This was a matter of express enactment in the act of 1867.20 There is no limitation in the statute of the court's jurisdiction over his person in respect to the time of his discharge. The language of section 21 authorizes the court, by order, to require the bankrupt to appear in court or before a referee or the judge of any state court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration in bankruptcy. The only limitation, with reference to time, seems to be that the estate shall still be in the process of administration. There can be no doubt of the right to examine a bankrupt, upon a proper application being made for that purpose, after his discharge is suspended or vacated.

An examination may be adjourned to a certain day, but if it is adjourned without day a new notice of examination is necessary.<sup>21</sup>

<sup>18</sup> B. A. 1898, Sec. 12a, as amended by the act of June 25, 1910, 36 Stat. at L. 838.

<sup>17</sup> General Ord. 12. In re Solis,
 No. 13165 Fed. Cas., 4 Ben. 143; In re
 Vetterlein, No. 16926 Fed. Cas., 5
 Ben. 7; In re Frizelle, No. 5132
 Fed. Cas., 5 N. B. R. 119.

<sup>18</sup> In re Seckendorf, No. 12600

Fed. Cas., 2 Ben. 462; *In re* Mawson, No. 93210 Fed. Cas., 1 N. B. R. 271.

19 In re Westfall Bros. Co., 8 Am.
B. R. 431; In re Anthony Peters,
1 Am. B. R. 248.

20 R. S. Sec. 5104.

<sup>21</sup> In re Price, 1 Am. B. R. 419, 91 Fed. Rep. 635.

# § 609. When persons other than a bankrupt may be examined.

The statute expressly authorizes the referee to exercise the powers vested in courts of bankruptcy for the administering of oaths to, and the examination of persons as witnesses, and for requiring the production of documents in proceedings before them, except the power of commitment.<sup>22</sup>

A court of bankruptcy may, upon application of any officer, bankrupt or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court or before a referee or the judge of any state court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this act, provided that the wife may be examined only touching business transacted by her or to which she is a party,<sup>23</sup> and to determine the fact whether she has transacted or been a party to any business of the bankrupt.<sup>24</sup>

The language of these provisions is very general. They give the referee power to summon any person who could give evidence in a court at law.<sup>25</sup> The examination of such person rests in the discretion of the court. A creditor can not demand the examination of a particular person as of right,<sup>26</sup> if in the judgment of the trustee and referee that is not desirable or in the interest of the estate.<sup>27</sup> They authorize the examination of him upon all matters, which are likely to arise in respect to the bankrupt or his property.

The only limitation as to time within which this power may be exercised is that the estate shall be in process of admin-

<sup>&</sup>lt;sup>22</sup> B. A. 1898, Sec. 38, clause 2.

<sup>23</sup> B. A. 1898, Sec. 21, as amended
Feb. 5, 1903, 32 Stat. at L. 797. In
re Andrews, 130 Fed. Rep. 383, 12
Am. B. R. 267.

<sup>&</sup>lt;sup>24</sup> B. A. 1898, Sec. 21*a*, as amended Feb. 5, 1903, 32 Stat. at L. 797. Compare R. S. Sec. 5087.

<sup>&</sup>lt;sup>25</sup> This includes a trustee in insolvency under a state proceeding. See *In re* Pursell, 114 Fed. Rep. 371, 8 Am. B. R. 96.

<sup>&</sup>lt;sup>26</sup> In re Andrews, 130 Fed. Rep. 383, 12 Am. B. R. 267; In re Abbey Press (C. C. A. 2d Cir.), 134 Fed. Rep. 51, 67 C. C. A. 161, 13 Am. B. R. 11.

<sup>&</sup>lt;sup>27</sup> In re Andrews, 130 Fed. Rep. 383, 12 Am. B. R. 267; In re Abbey Press (C. C. A. 2d Cir.), 134 Fed. Rep. 51, 67 C. C. A. 161, 13 Am. B. R. 11.

istration in bankruptcy. The judge or referee may therefore summon a witness at any time after the commencement of proceedings until the estate is closed by order of court. The referee, of course, can only summon witnesses while the case is pending before him upon reference.

A person is exempt from arrest or service of process while attending as a witness before the judge or referee.<sup>28</sup>

# § 610. Competency of witnesses under state law.

Prior to the amendment of February 5, 1903, only persons who were competent witnesses under the laws of the state in which the proceedings were pending, could be examined.<sup>28\*</sup> This is the rule with reference to examination of witnesses in proceedings instituted prior to the amendment. A wife not competent to testify under the law of the state can not be compelled to testify in such bankruptcy proceedings.<sup>29</sup>

In proceedings instituted since the amendment of February 5, 1903, the competency of witnesses under the state law is immaterial. A wife may be examined only touching business transacted by her or to which she is a party and to determine the fact whether she has transacted or been a party to any business of the bankrupt's.<sup>30</sup>

# § 611. Where examination may take place.

The examination is regularly held at the office of the referee or some convenient place near-by. It may be held in any place where the creditors and the bankrupt can attend.

The bankrupt can not be required to attend at or for an examination at a place more than one hundred and fifty miles distant from his home or principal place of business, unless ordered by the court or a judge thereof for cause shown.<sup>32</sup>

<sup>28</sup> In re Kimball, No. 7767 Fed. Cas., 2 Ben. 38. See also service of subpœna, Sec. 73, ante.

<sup>28\*</sup> In re Price, 91 Fed. Rep. 635, 1 Am. B. R. 419; In re Westfall Bros. Co., 8 Am. B. R. 431.

29 In re Jefferson, 96 Fed. Rep.

826, 3 Am. B. R. 174; In re Fowler, 93 Fed. Rep. 417, 1 Am. B. R. 555.

30 B. A. 1898, Sec. 21a, as amended Feb. 5, 1903, 32 Stat. at L. 797.

In re Worrell, 125 Fed. Rep. 159, 10 Am. B. R. 744.

82 B. A. 1898, Sec. 7, clause 9.

## § 612. How to obtain an examination.

The judge or referee may make the order for an examination.<sup>33</sup>. The referee usually makes the order for examination after the order requiring the bankrupt to attend before the referee, which is made by the judge in the order of reference.<sup>34</sup> Orders for examination of a bankrupt subsequent to the first one are regularly made only upon application and for cause shown.<sup>35</sup>

The application is usually made by petition or motion. The petition must designate the persons to be examined, but it need not specify the particular matters concerning which an examination is sought. In a proper case a letter or a verbal request may be sufficient upon which to make the order for examination.<sup>36</sup>

Less proof, of course, is required from an officer, as a trustee, than from a creditor. The proceeding is ex parte, and no previous notice is required to be given to any party. 39

The form of the order for an examination of a bankrupt is prescribed by the supreme court.<sup>40</sup> It should be entered of record among the proceedings before the referee.

# § 613. Detaining bankrupt for examination.

A bankrupt may be arrested, under certain circumstances, and held in custody for purposes of examination.

38 B. A. 1898, Sec. 21; Sec. 1, clause 7; Sec. 38, and Official Form No. 28; see Form No. 47, post.

84 General Ord. 12.

<sup>35</sup> In re Frisbie, No. 5131 Fed.
Cas., 13 N. B. 349; In re Isidor,
No. 7105 Fed. Cas., 2 Ben. 123; In re Frizelle, No. 5133 Fed. Cas., 5
N. B. R. 122.

<sup>36</sup> In re Howard, 95 Fed. Rep. 415, 2 Am. B. R. 582; In re Abbey Press (C. C. A. 2d Cir.), 134 Fed. Rep. 51, 67 C. C. A. 161, 13 Am. B. R. 11. A certificate of a referee of the refusal of the bankrupt to

be examined can not stand as an application by the creditors for an order to examine the bankrupt as witness, and therefore, the district court refused to consider the question. Craddock-Terry Co. v. Kaufman, 175 Fed. Rep. 303, 23 Am. B. R. 724.

<sup>38</sup> In re McBrien, No. 8665 Fed. Cas., 2 Ben. 513.

<sup>39</sup> In re Macintire, No. 8821 Fed. Cas., 1 Ben. 277.

40 Official Form No. 28; see Form No. 47, post.

The statute provides "the judge may at any time after the filing of a petition by or against a person, and before the expiration of one month after the qualification of the trustee, upon satisfactory proof by the affidavits of at least two persons that such bankrupt is about to leave the district in which he resides or has his principal place of business to avoid examination, and that his departure will defeat the proceedings in bankruptcy, issue a warrant to the marshal, directing him to bring such bankrupt forthwith before the court for examination." <sup>41</sup>

It will be observed that this provision providing for the arrest and detention of a bankrupt is quite limited. There is no provision for the seizure of property. The bankrupt can only be arrested when he is about to leave the district to avoid an examination and thereby defeat the proceedings. It has been held that an order can not be made after the bankrupt has actually fled from the district as a ground for an order of extradition. If he is about to depart for other purposes such as to better his condition, it would seem that this provision would not apply to him. The warrant must be issued within one month after the qualification of the trustee. He can not be held in custody more than ten days, and can not be imprisoned during that period.

Proceedings for a warrant are properly instituted by a petition or motion supported by affidavits or depositions of at least two persons. The prayer should not be included in the petition in bankruptcy, but should be a separate motion or petition.<sup>43</sup> The affidavits or depositions should show the facts, and not mere opinions or belief of the affiants or deponents. The material facts should be stated upon personal knowledge, and not upon information and belief.<sup>44</sup>

<sup>&</sup>lt;sup>41</sup> B. A. 1898, Sec. 9b. Compare R. S. Sec. 2054. See further, Sec. 638, post.

<sup>&</sup>lt;sup>42</sup> In re Hassenbusch (C. C. A. 6th Gir.), 108 Fed. Rep. 35, 47 C. C. A. 177.

<sup>&</sup>lt;sup>43</sup> In re McKibben, No. 8859 Fed. Cas., 12 N. B. R. 97; In re Hadley, No. 5894 Fed. Cas., 12 N. B. R. 366.

<sup>&</sup>lt;sup>44</sup> In re McKibben, No. 8859 Fed. Cas., 12 N. B. R. 97; In re Hadley, No. 5894 Fed. Cas., 12 N. B. R. 366.

Satisfactory proof of this character must be introduced to show, first, that the bankrupt is about to leave the district in which he resides or has his principal place of business; 45 second, that he is leaving the district to avoid examination; and, third, that his departure will defeat the proceedings in bankruptcy.

The court will probably admit counter affidavits to be filed by the bankrupt, if he desires to take issue with the petitioning creditors. This was manifestly, the intent of Congress. It is provided that the warrant issue only "upon satisfactory proof," and also, "if upon hearing the evidence of the parties it shall appear to the court or judge thereof that the allegations are true, and that it is necessary, he shall order the marshal," etc. This implies that evidence may be introduced by both parties, and that a hearing shall be had. The intent of Congress, with reference to the arrest and detention of a bankrupt, as gathered from the whole provision, is not to permit persecution of the bankrupt or a detention for an unreasonable time, nor an arrest, unless the proof shows conclusively the three elements mentioned above. At least a bankrupt is entitled to a hearing before he is ordered to be kept in custody.

The affidavits or depositions may be taken before a referee; an officer authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the state where the same are to be taken; or a diplomatic or consular officer of the United States in any foreign country. Any person conscientiously opposed to taking an oath may, in lieu thereof, affirm. Any person who shall affirm falsely shall be punished as for making of a false oath.<sup>46</sup>

"If upon hearing the evidence of the parties it shall appear to the court or the judge thereof that the allegations are true and that it is necessary, he shall order such marshal to

<sup>&</sup>lt;sup>45</sup> As to the meaning of the words "about to leave," consult Jackson v. Burke, 4 Heiskell (Tenn.), 614; Meyers v. Farrell, 47 Miss. 283;

Elliott v. Keith, 32 Mo. App. 585; Bennet v. Avant, 2 Sneed (Tenn.), 152.

<sup>&</sup>lt;sup>46</sup> B. A. 1898, Sec. 20.

keep such bankrupt in custody not exceeding ten days, but not imprison him, until he shall be examined and released or give bail conditioned for his appearance for examination, from time to time, not exceeding in all ten days, as required by the court, and for his obedience to all lawful orders made in reference thereto."47 The arrest is in no manner for security or satisfaction of a creditor's debt. It is simply to secure the attendance of the respondent from time to time, for a period of ten days, as the court shall order, for an examination. It is to that purpose and no other that bail is required of him.

#### § 614. When bankrupt is imprisoned.

If, at the time of preferring his petition, the debtor shall be imprisoned, the court, upon application, may order him to be produced upon habeas corpus, by the jailor or any officer in whose custody he may be, before the referee, for the purpose of testifying in any matter relating to his bankruptcy,48 but such production for examination is a matter of discretion and not of right.49

# § 615. Extradition—Ancillary jurisdiction to examine.51

It has been held that a court of bankruptcy is without power to make an order for the extradition of a bankrupt, after he had escaped into another district, for the purpose of an examination,52 and that a bankrupt can not be exam-

47 B. A. 1898, Sec. 9b; In re Sheehan, No. 12737 Fed. Cas., 8 N. B. R. 345.

48 General Ord. 30. In re Gilbert, 2 N. B. N. 378.

49 In re Thaw (C. C. A. 3d Cir.), 166 Fed. Rep. 71, 91 C. C. A. 657, 21 Am. B. R. 561.

Unless the necessity is so great that the ends of justice may be defeated if the evidence were not produced, the bankrupt court will not remove a bankrupt confined by

the court of another jurisdiction in a hospital for the criminal insane for examination, especially as his evidence may be taken by deposition. In re Thaw, 172 Fed. Rep. 288, 22 Am. B. R. 687.

51 As to extradition, see further, Sec. 642, post.

52 In re Hassenbusch (not reported), but affirmed, In re Hassenbusch (C. C. A. 6th Cir.), 108 Fed. Rep. 35, 47 C. C. A. 177.

ined by the order of a court of bankruptcy other than the one in which the bankruptcy proceedings are pending in the exercise of ancillary jurisdiction.<sup>53</sup>

It is now settled that the district court has ancillary jurisdiction to order an examination of a witness residing in the district, although the bankruptcy proceedings are pending in another district.<sup>54</sup> Ancillary jurisdiction is expressly conferred by the amendment of 1910.<sup>55</sup>

## § 616. Notices to bankrupts.

A copy of the order for examination of the bankrupt, signed by the referee, should be delivered to the bankrupt as soon as may be.<sup>56</sup> A copy of the order is used in place of a summons or subpœna. Where service is made upon a bankrupt by delivering him a copy of the order, proof of service may be made by affidavit of the person delivering it or by a written acceptance of service by the bankrupt. If the bankrupt appears, he waives any irregularity in the service. A bankrupt is a party to the proceedings, and is required to comply with all lawful orders of the judge or referee.<sup>57</sup>

When the bankrupt is present before the court or referee he may be examined without previous notice being given him.<sup>58</sup> In other cases the bankrupt is entitled to a reasonable notice of his examination.

A reasonable notice is such time as will enable him to reach and appear before the court or referee with such knowledge as may be under his control upon the matters of the investigation or information asked for. "This depends upon the circumstances and facts surrounding the bankrupt, the distance he is from the court or the place of his examination, and also upon what, if any, particular facts he is to

<sup>&</sup>lt;sup>53</sup> In re Williams, 123 Fed. Rep. 321, 10 Am. B. R. 538.

 <sup>54</sup> Elkus Petitioner, 216 U. S. 115,
 54 Fed. 407, 23 Am. B. R. 614; In re Robinson, 179 Fed. Rep. 724, 24
 Am. B. R. 617. In re Sutter Bros.,
 131 Fed. Rep. 654, 11 Am. B. R. 632.

<sup>&</sup>lt;sup>55</sup> Section 2 of the act of June 25, 1910, 36 Stat. at L. 838.

<sup>&</sup>lt;sup>56</sup> Official Form No. 28; see Form No. 47, post.

<sup>&</sup>lt;sup>67</sup> B. A. 1898, Sec. 7, clause 2.

<sup>&</sup>lt;sup>58</sup> B. A. 1898, Sec. 7, clause 9; *In re* Bromley & Co., 3 N. B. R. 86;

be examined. If the defendant is a merchant, and has been doing a large and complicated business, and he is notified that his examination is to cover his entire business operations, a reasonable time would manifestly be much longer than in a case where the notice of examination was in regard to a few items of his property." <sup>59</sup>

#### § 617. Notice to creditors.

The referee is also required to give at least ten days' notice to all his creditors of all examinations of the bankrupt.<sup>60</sup>

This notice is regularly sent by mail to the respective addresses of the creditors as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors.<sup>61</sup> The creditors may waive notice in writing.<sup>62</sup>

No notice to creditors of the examination of witnesses, other than the bankrupt, is required. A creditor who has proved his claim is bound to obey all the orders of the court touching his alleged debt, and therefore may be summoned by service of a copy of the order for an examination of him in respect to his claim.<sup>63</sup>

# § 618. Summons to persons not parties.

Where a person is not a party to the proceedings, and therefore not bound to obey the orders made therein, he must be brought before the court for examination by process of summons. The form of summons is prescribed.<sup>64</sup> This must issue out of court under the seal thereof and be tested

In re Brandt, No. 1812 Fed. Cas., 2 N. B. R. 215.

<sup>59</sup> *In re* Bromley & Co., 3 N. B. R. 692-3.

<sup>60</sup> B. A. 1898, Sec. 58a, as amended by statute, June 25, 1910, Sec. 91/2.

<sup>61</sup> B. A. 1898, Sec. 58*a*, as amended by statute, June 25, 1910, Sec. 9½.

<sup>62</sup> B. A. 1898, Sec. 58a, as amended by statute, June 25, 1910, Sec. 9½.

<sup>63</sup> General Ord. 21, par. 6. Inre
Kyler, No. 7956 Fed. Cas., 2 Ben.
414; In re Paddock, No. 10657
Fed. Cas., 6 N. B. R. 132; In re
Pease, 29 Fed. Rep. 593.

<sup>64</sup> Official Form No. 30; see Form No. 49, post.

by the clerk.<sup>65</sup> Blanks with the signature of the clerk and the seal of the court may be furnished to the referee upon application.<sup>66</sup>

The summons may be served by any person. The return is in the form of an affidavit of personal service prescribed in Form No. 30.

It may be served upon witnesses living without the district, but within one hundred miles of the place of testifying. But no person can be required to attend as a witness before a referee at a place outside of the state of his residence, and more than one hundred miles from such place of residence, and only in case his lawful mileage and fee for one day's attendance shall be first paid or tendered to him. 68

A person who disobeys a summons to appear before a referee to be examined as a witness may be punished for contempt.<sup>69</sup>

## § 619. Witness fees.

The bankrupt is not entitled to witness fees in any case.<sup>70</sup> But he is allowed his actual expenses from the estate when examined or required to attend at any place other than the city, town, or village of his residence.<sup>71</sup>

A witness other than the bankrupt must be tendered his witness fees before he can be declared in contempt.<sup>72</sup>

65 General Ord. 3. Official Form
No. 30; see Form No. 49, post.
66 General Ord. 3. In re Abbey
Press (C. C. A. 2d Cir.), 134 Fed.
Rep. 51, 13 Am. B. R. 11.

<sup>67</sup> R. S. Sec. 876; In re Woodward, No. 18000 Fed. Cas., 8 Ben. 112.

68 B. A. 1898, Sec. 41a; In re Cole,
133 Fed. Rep. 414, 13 Am. B. R.
300; In re Hemstreet, 117 Fed. Rep.
568, 8 Am. B. R. 760; In re Marcus,
160 Fed. Rep. 229, 20 Am. B. R. 397.
69 B. A. 1898, Sec. 41 and Sec. 2,
clause 16.

In re Kerber, 125 Fed. Rep. 653, 10 Am. B. R. 747, it was held that his mileage and fee for one day's attendance must be paid or tendered witness before he could be attached for contempt.

70 In re Okell, No. 10475 Fed.
 Cas., 2 Ben. 144; In re McNair, No.
 8907 Fed. Cas., 2 N. B. R. 219.

71 B. A. 1898, Sec. 7, clause 9.
 72 In re Johnson & Knox Lumber Co. (C. C. A. 4th Cir.), 151
 Fed. Rep. 207, 80 C. C. A. 259, 18
 Am. B. R. 50; In re Kerber, 125
 Fed. Rep. 653, 20 Am. B. R. 397;
 In re Marcus, 160 Fed. Rep. 229,

# § 620. How an examination is made.

At the time and place appointed, the bankrupt, creditor, or other witness must present himself for examination.

The testimony before a referee is usually taken orally. It is the duty of the referee, upon application of any party in interest, to preserve the evidence taken, or the substance thereof, as agreed upon by the parties before them when a stenographer is not in attendance. In practice, the evidence taken before a referee is usually taken down in writing by him or under his direction in the form of narratives, unless he determines the examination should be taken by question and answer, which is within the discretion of the referee.

He is authorized, upon the application of the trustee, to employ a stenographer at the expense of the estate at a compensation not to exceed ten cents per folio for reporting and transcribing the evidence, <sup>76</sup> which compensation should be agreed upon before the hearing begins. <sup>77</sup>

The examination of witnesses before the referee may be conducted by the party in person or by his counsel or attorney, who shall not be the attorney for the bankrupt, 78 and the witnesses shall be subject to examination and cross-examination, which shall be had in conformity with the mode now adopted in the courts of law. 79

The bankrupt should be allowed to correct his evidence when mistaken, so and where time is needed to refresh the memory by referring to books or papers, or for the production of any written instruments or documents, it should be granted. st

20 Am. B. R. 397 (husband of bankrupt); *In re* Boeshore, 10 Am. B. R. 802 (although the witness does not demand fees at the time of service).

<sup>73</sup> B. A. 1898, Sec. 39, clause 9. <sup>74</sup> General Ord. 22.

<sup>75</sup> In re Goldstein, 155 Fed. Rep. 695, 19 Am. B. R. 96.

<sup>76</sup> B. A. 1898, Sec. 38, clause 5.
 <sup>77</sup> In re Stark, 155 Fed. Rep. 694,
 18 Am. B. R. 467.

<sup>78</sup> In re Teuthorn, 5 Am. B. R. 767 (referee's decision).

79 General Ord. 22.

The bankrupt may be cross-examined, see *In re* Levy, No. 8296 Fed. Cas., 1 Ben. 496; *In re* Leachman, No. 8157 Fed. Cas., 1 N. B. R. 391; *In re* Bragg, No. 1799 Fed. Cas., s. c. 5 Law Rep. 323.

<sup>80</sup> In re Hark Bros., 136 Fed. 986, 14 Am. B. R. 624.

<sup>81</sup> In re Tanner, No. 13745 Fed. Cas., 1 Low. 215.

## § 621. Objections—Record.

When objections are made to questions and answers in the course of the examination, the grounds of the objection and the ruling of the referee should be noted by the referee.

It is the duty of the referee to rule upon objections. General Order 22 expressly requires him to note "his decision." But he should not exclude evidence offered, although he may decide it to be incompetent, immaterial, or irrelevant. He should receive all the evidence offered and make a record of all that transpires on the examination of the witness. Questions, objections, rulings, exceptions and answers should all be taken down for the use of the court. This is true whether he is acting in his judicial capacity as referee, or as a master under an order to report facts and conclusions of law, or taking a deposition under a commission. The reason is that in the first instance the matter may be reviewed by the judge, who may differ with the referee with respect to the admissibility of the evidence; and in case he is acting as a

82 In re Sturgeon (C. C. A. 2d Cir.), 139 Fed. Rep. 608, 14 Am. B. R. 681; Bank of Ravenswood v. Johnson (C. C. A. 4th Cir.), 143 Fed. Rep. 463, 16 Am. B. R. 206; First Nat. Bank v. Abbott (C. C. A. 8th Cir.), 165 Fed. Rep. 852, 91 C. C. A. 538, 21 Am. B. R. 436; Missouri-American Electric Co. v. Hamilton Brown (C. C. A. 8th Cir.), 165 Fed. Rep. 283, 91 C. C. A. 251, 21 Am. B. R. 270; In re Romine, 138 Fed. Rep. 837, 14 Am. B. R. 785; In re Lipset, 119 Fed. Rep. 379, 9 Am, B. R. 32. But see In re Wilde's Sons, 131 Fed. Rep. 142, 11 Am. B. R. 714.

In First Nat. Bank v. Abbott, supra, Judge Sanborn, speaking for the Circuit Court of Appeals for the 8th Circuit, said: "The referee, after noting the objections to the questions, his rulings thereon, and

the exceptions thereto, should have taken, written down, and returned the rejected evidence. If he refused or failed to do so upon proper request, the remedy of the party aggrieved was not an appeal, but an application to the District Court, and, failing there, to the United States Circuit Court of Appeals, for an order that such testimony be taken and preserved. When the rejected testimony made a part of the record and returned to an Appellate Court, and then only, can such a court consider and decide the legality of the rulings which excluded it, and, after determining that question, it will proceed to decide whether or not all the admissible evidence presented to it sustains the decree below, and to render a final decree accordingly."

master or commissioner, the court, which is to decide the matter, is entitled to have all of the evidence for that purpose and to decide what evidence shall be excluded and what may be considered. The proper practice is for the referee to make his ruling and thereupon require the question to be answered. If his ruling be against the question and the court shall reverse his finding, it will not be necessary to have a re-examination of the witness. If the court shall affirm his ruling, the answer may properly be disregarded by the court.<sup>83</sup>

The referee need not stay the examination for the purpose of certifying each question to the judge for his decision.<sup>85</sup> The examination should continue and the question be certified after the deposition is complete to prevent delay. If either party persists in offering incompetent, immaterial or irrelevant matter in evidence over the objection and ruling of the referee the remedy of the other party is to apply to the court for costs.<sup>87</sup> The court is expressly given "power to deal with the costs of incompetent, immaterial or irrelevant depositions, or parts of them, as may be just." <sup>88</sup>

In case a witness refuses to be sworn or to answer any particular question, the referee should rule upon the question. If either party is dissatisfied with his ruling, he may have the question certified to the judge for review.<sup>89</sup> The

83 In re De Gottardi, 114 Fed. Rep. 328, 7 Am. B. R. 723, 746. Under general orders in Bankruptcy, No. 22, it is the better practice as a general rule to hold that the referee should take down the question and answer and objection, and certify the whole record to the district court, where the matter is not of such importance that an immediate ruling may be required. In re Isaacson, 175 Fed. Rep. 292, 23 Am. B. R. 665.

85 In re Romine, 138 Fed. Rep.837, 14 Am. B. R. 785; Bank of

Ravenswood v. Johnson (C. C. A. 4th Cir.), 143 Fed. Rep. 463, 16 Am. B. R. 206.

Referee may pass on the competency of a question and should certify the question to the court when asked to do so in a particular manner. *In re* Ruos, 159 Fed. Rep. 252, 20 Am. B. R. 281.

<sup>87</sup> In re Sturgeon (C. C. A. 2d Cir.), 139 Fed. Rep. 608, 14 Am. B. R. 681.

88 General Ord. 22.

89 General Ord. 27. Official Form 56; see Form No. 136, post; Bank of

examination may be adjourned pending the decision of the judge upon such question.

# § 622. Assistance of counsel to person examined.

A witness is not entitled to be attended or represented by counsel during his examination,90 and the counsel for the bankrupt is not entitled to be present at an examination of a witness other than the bankrupt.91 The bankrupt, being a party to the proceedings, is entitled to have the assistance of counsel.

The true rule, with reference to what assistance he is entitled to, is thus stated by Judge Lowell: "The questions to a bankrupt are usually concerning matters of fact, and in the vast majority of cases involve nothing requiring advice or consultation; and the presence of counsel, with the right to object to improper questions, and to uphold the rights of the bankrupt in substantially the same manner that he would do if his client were called to the stand in his own cause in any other court, and with the further reserved right to advise with him concerning his answers when the referee can see cause there--for, meets, as it seems to me, all the requirements of justice in this regard." 92

The wife of the bankrupt is not entitled to the assistance of counsel any more than any other witness, and the bankrupt's counsel has no right to advise her while under examination.93

Ravenswood v. Johnson (C. C. A. 4th Cir.), 143 Fed. Rep. 463, 16 Am. B. R. 206.

90 In re Abbey Press (C. C. A. 2d Cir.), 134 Fed. Rep. 51, 13 Am. B. R. 11; In re Comstock, No. 3080 Fed. Cas., 3 Saw. 517; In re Fredenberg, No. 5070 Fed. Cas., 2 Ben. 133; In re Stuyvesant Bank, No. 13582 Fed. Cas., 6 Ben. 33; In re Feinberg, No. 4716 Fed. Cas., 2 Ben. 162.

91 Matter of Adler & Co., 21 Am. B. R. 302 (referee).

92 In re Tanner, No. 13745 Fed. Cas., 1 Low. 215. See also In re Judson, No. 7562 Fed. Cas., 2 Ben. 210; In re Lord, No. 8502 Fed. Cas.. 3 N. B. R. 243. See In re Cobb, 7 Am. B. R. 104, as to the right of bankrupt to cross-examine witnesses; In re Hark Bros., 136 Fed. 986, 14 Am, B. R. 624.

93 In re Schonberg, No. 12477 Fed. Cas., 7 Ben. 211.

# § 623. Depositions.

A witness, who resides beyond the district or state and more than one hundred miles from the court, can not be compelled to appear for examination before a referee of the court in which bankruptcy proceedings are pending.<sup>94</sup> The examination of such witnesses may be by deposition.

The bankrupt act provides that the right to take depositions in proceedings under this act shall be determined and enjoyed according to the United States laws now in force, or such as may be hereafter enacted relating to the taking of depositions, except as herein provided.95 A court having charge of the administration of a bankrupt's estate has power to order that any person having knowledge "concerning the acts, conduct, or property of the bankrupt," but who resides without the district or state, and more than one hundred miles from the court, shall be examined before a commissioner in accordance with the provisions of the general statutes or practice in equity cases, and that persons so ordered to be examined may be compelled by proper process, as in other cases, to appear and testify.96 The United States laws make ample provisions for such examinations. Depositions de bene esse may be taken,97 or a dedimus potestatum or a commission may be issued,98 or depositions may be taken under the equity rules.99

Ample provision is made for the issuance of a subpœna by the elerk of any court in the United States where the witnesses reside, to take the testimony of such ab-

<sup>94</sup> B. A. 1898, Sec. 41a; In re
Cole, 133 Fed. Rep. 414, 13 Am.
B. R. 300; In re Hemstreet, 117
Fed. Rep. 568, 8 Am. B. R. 760.

95 B. A. 1898, Sec. 21b.

96 In re Williams, 123 Fed. Rep.321, 10 Am. B. R. 538.

This was done In re Carley, 106 Fed. Rep. 862, 5 Am. B. R. 554, and In re Sturgeon (C. C. A. 2d Cir.), 139 Fed. Rep. 608, 14 Am. B. R. 681.

See also In re Watkinson & Co., 130 Fed. Rep. 218, 42 Am. B. R. 370; In re Hemstreet, 117 Fed. Rep. 568, 8 Am. B. R. 760.

97 R. S. Sec. 863,

98 R. S. Sec. 866,

<sup>99</sup> R. S. Secs. 862, 917; Eq. Rules 67 and 71. Examination of a non-resident witness may be obtained by taking his deposition or by an order for examination on application to the federal court of the

sent witnesses before a commissioner appointed by the court where the proceedings are pending, and a neglect or refusal to attend or testify can be punished by the judge of the court which issues the subpœna. A subpœna duces tecum may be had and enforced in such an examination. The subpœna may run to any district within one hundred miles of the place of holding court, but a person can not be compelled to attend as a witness at a distance of more than one hundred miles, and he can not be compelled to leave the state wherein he resides.

. It seems therefore that a court having charge of the administration of a bankrupt's assets, may order that any person having knowledge "concerning the acts, conduct or property of a bankrupt," but who resides beyond the district or state and more than one hundred miles from the court, shall be examined before a commissioner appointed for the purpose.4 Any officer, bankrupt or creditor may apply to the court administering the bankrupt's assets for an order to take the depositions of absent, as well as resident, witnesses.<sup>5</sup> The court will then make an order, in a proper case, for a commission to issue to a referee or other person residing in the same district as the witnesses, authorizing him to take the depositions. Notice of the taking of the depositions must be filed with the referee in every case.6 When depositions are to be taken in opposition to the allowance of a claim, notice must also be served upon the claimant, and when in opposition to a discharge, notice must be served upon the bankrupt.

district where the witness resided. In re Robinson, 179 Fed. Rep. 724, 24 Am. B. R. 617; Elkus Petitioner, 216 U. S. 115, 54 L. Ed. 407, 23 Am. B. R. 614.

<sup>1</sup> R. S. Sec. 868.

<sup>2</sup> R. S. Secs. 868, 869.

R. S. Sec. 876; B. A. 1898, Sec. 41a; In re Cole, 133 Fed Rep. 414, 13 Am. B. R. 300; In re Hemstreet, 117 Fed. Rep. 568, 8 Am. B. R. 760.

<sup>4</sup> In re Williams, 123 Fed. Rep.

321, 10 Am. B. R. 538; In re Carlley, 106 Fed. Rep. 862, 5 Am. B. R. 554; In re Sturgeon (C. C. A. 2d Cir.), 139 Fed. Rep. 608, 14 Am. B. R. 681; In re Watkinson Co., 130 Fed. Rep. 218, 12 Am. B. R. 370; In re Hemstreet, 117 Fed. Rep. 568, 8 Am. B. R. 760.

<sup>5</sup> B. A. 1898, Sec. 21a, as amended Feb. 5, 1903, 32 Stat. at L. 797.

<sup>6</sup> B. A. 1898, Sec. 21c.

If the witness refuses to answer a question the judge of the bankruptcy court in the district in which the examination is being had is the proper person to whom to apply to compel the witness to answer.<sup>7</sup>

When the examination is completed, the deposition must be read over to the witness and signed by him in the presence of the referee.<sup>8</sup> The referee must note upon the deposition any question objected to, with his decision thereon; and the court may deal with the cost of incompetent, immaterial and irrelevant depositions, or any parts of them, as may be just.<sup>9</sup>

The examination may be adjourned from time to time as may suit the convenience of the parties.

The testimony of a bankrupt should be admitted in evidence even where he failed to sign it.<sup>10</sup>

## § 624. Upon what topics the bankrupt may be examined.

The bankrupt may be examined concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate.<sup>11</sup>

He must answer all questions relating to these subjects fully and completely.<sup>12</sup> A large latitude of inquiry is allowed in the examination of the bankrupt and other persons closely connected with him in his business dealings for the purpose of discovering the assets and unearthing frauds and upon any reasonable surmise that they have the assets of the debtor. <sup>13</sup> Where questionable proceedings have been

<sup>7</sup> In re Carley, 106 Fed. Rep. 862, 5 Am. B. R. 554; R. S. Secs. 868, 869.

8 General Ord. 22.

<sup>9</sup> General Ord. 22.
 <sup>10</sup> In re Bard, 108 Fed. Rep. 208,
 5 Am. B. R. 810.

<sup>11</sup> B. A. 1898, Sec. 7, clause 9. Compare R. S. Sec. 5086. See *In*  re Abrahamson & Bretstein, 1 Am. B. R. 44.

<sup>12</sup> In re Salkey, No. 12253 Fed. Cas., 6 Biss. 269.

18 In re Horgan (C. C. A. 2d
Cir.), 98 Fed. Rep. 414, 3 Am. B.
R. 253; In re Foerst, 93 Fed. Rep. 190, 1 Am. B. R. 259; In re Carley, 106 Fed. Rep. 862, 5 Am. B. R. 554;

disclosed greater latitude in the prosecution of inquiries should be allowed.<sup>14</sup> Where a bankrupt fails to testify fully and fairly and truthfully, the court or referee is at liberty to accept his testimony as it may seem to be supported by other witnesses, or if unworthy of credit it may be rejected altogether.<sup>15</sup>

The bankrupt may be examined with reference to property which has come into his possession and not been accounted for, <sup>16</sup> or with relation to his wife's property if it is shown that he may possibly have an interest in it, <sup>17</sup> or any other property in which he may possibly have an interest, <sup>18</sup> or in reference to matters which transpired before the creation of the debt, <sup>19</sup> or for the purpose of eliciting facts to be used in

People's Bank v. Brown (C. C. A. 3d Cir.), 112 Fed. Rep. 652, 7 Am. B. R. 475; *In re* Cliffe, 97 Fed. Rep. 540, 3 Am. B. R. 257.

In United States v. Wechsler, 16 Am. B. R. 1. Judge Holt, in charging the jury in a trial of the bankrupt for perjury, uses this language: "It is a broad field of inquiry and intended to be so, and this section (21 of the bankrupt act) is the section under which the investigations usually take place about the property of the bankrupt, particularly in cases where there is any suspicion that there has been any attempt to take property and conceal it from creditors. As soon as a receiver is appointed, if he has any such suspicion, he gets one of these orders; the bankrupt is brought up for examination; and the question then is what property he has. If there .have been recent transfers of property or payments of money on the eve of bankruptcy, that is a suspicious fact, particularly if they have been transferred to relatives and connections. All such transfers become material subjects of inquiry; and in order to ascertain what the truth is about them, the party examining the bankrupt is not confined to a mere inquiry, or a mere explanation of what it was transferred for, but counsel have a right to inquire into all the surrounding circumstances in the case in order to ascertain what the truth is in that respect.

<sup>14</sup> In re Foerst, 93 Fed. Rep. 190,
 1 Am. B. R. 259.

<sup>15</sup> In re Tudor, 100 Fed. Rep. 796,
 4 Am. B. R. 78; In re Leslie, 119
 Fed. Rep. 406, 9 Am. B. R. 561.

16 In re Salkey, No. 12253 Fed.
 Cas., 6 Biss. 269; In re McBrien,
 No. 8666 Fed. Cas., 3 Ben. 481.

<sup>17</sup> In re Horgan (C. C. A. 2d Cir.), 98 Fed. Rep. 414, 3 Am. B. R. 253; In re Craig, No. 3323 Fed. Cas., 4 N. B. R. 50; In re Clark, No. 2805 Fed. Cas., 4 N. B. R. 237.

18 In re Bonesteel, No. 1628 Fed.
 Cas., 2 N. B. R. 440; In re Brundage, 100 Fed. Rep. 613, 4 Am. B.
 R. 47.

<sup>19</sup> In re Craig, No. 3322 Fed. Cas.,3 Ben. 353.

opposing his discharge.<sup>20</sup> He may be required to furnish the trustee with the combination to his safe.<sup>21</sup>

When he seeks to be discharged, he must submit himself, if required, to be examined, with a view to show whether he has made a full and fair surrender of his property and statement of his debts. But it is not competent for the referee to summon witnesses who may know, or be suspected of knowing, facts pertinent to or that might be serviceable in the preparation of specifications against his discharge.<sup>22</sup> In regard to such facts, a creditor is left to establish them on the trial as parties do in ordinary trials at law. It is not a sufficient excuse for not answering a question put to the bankrupt that he has replied to it at a former examination held at the instance of some other creditor or the assignee.<sup>22</sup>

On the other hand, a bankrupt can not be examined touching matter wholly irrelevant to and not bearing on his bankruptcy. He is privileged from being examined in respect to property which has been acquired since the adjudication in bankruptcy proceedings; 24 and also with reference to property which he does not own or have an interest in; 25 or as to a statement to the assessors privileged under state statute. 26

## § 625. Incriminating evidence.

The bankrupt can not be compelled to answer a question the answer of which will tend to incriminate him,<sup>27</sup> but if

<sup>20</sup> In re Brandt, No. 1812 Fed. Cas., 2 N. B. R. 215; In re Price, 91 Fed. Rep. 635, 1 Am. B. R. 419; In re Jacobs & Roth, 154 Fed. Rep. 988. Whether or not he signed a statement on the strength of which he obtained property from one of his creditors.

<sup>21</sup> In re Hooks Smelting Co., 138 Fed. Rep. 954, 15 Am. B. R. 83.

<sup>22</sup> In re Vogel, No. 16984 Fed. Cas., 5 N. B. R. 393.

<sup>23</sup> In re Hayden, 96 Fed. 199, 1 Am. B. R. 670. Questions as to the circumstances of an assignment for the benefit of creditors more than a year prior to the bankrupt of the assignor are immaterial and improper, unless some basis therefor be laid.

<sup>24</sup> In re Patterson, No. 10815 Fed. Cas., 1 Ben. 508; In re Levy, No. 8296 Fed. Cas., 1 Ben. 496.

<sup>25</sup> In re Van Tuyl, No. 16880 Fed. Cas., 1 N. B. R. 636.

<sup>26</sup> In re Reid, 17 Am. B. R. 477. <sup>27</sup> In re Nachman, 114 Fed. Rep. 995, 8 Am. B. R. 180; United States, the court is convinced that the answer to the question can not by any possibility incriminate him he will be required to answer it.<sup>28</sup> The witness may rely on that portion of the fifth amendment of the Constitution of the United States which declares that "no person . . . shall be compelled in any criminal case to be a witness against himself." <sup>29</sup>

The bankruptcy act provides that "no testimony given by him shall be offered in evidence against him in any criminal proceeding." <sup>30</sup> The reason for the rule is that this provision does not grant him the immunity contemplated by section 5 of the Constitution. It can have no other effect than to protect the bankrupt against the use of his testimony in any prosecution in the courts of the United States. It would be no answer to a prosecution which might be instituted in the state courts which are not created by acts of Congress and which prescribe their own rules of proceeding independently of Congress. A bankrupt can not refuse to deliver the books of account kept by him to his trustee

Goldstein, 132 Fed. Rep. 789, 12 Am. B. R. 755; In re Feldstein, 103 Fed. Rep. 269, 4 Am. B. R. 321; In re Kanter, 117 Fed. Rep. 356, 9 Am. B. R. 104; In re Scott, 95 Fed. Rep. 815, 1 Am. B. R. 49; In re Shera, 114 Fed. Rep. 207, 7 Am. B. R. 552; In re Walsh, 104 Fed. Rep. 518, 4 Am, B. R. 693; In re Franklin Syndicate, 114 Fed. Rep. 205, 4 Am. B. R. 511; In re Rosser, 96 Fed. Rep. 305, 2 Am. B. R. 755. But see Mackel v. Rochester (C. C. A. 9th Cir.), 102 Fed. Rep. 314, 4 Am. B. R. 1; Counselman v. Hitchcock, 142 N. S. 562, 35 L. Ed. 1110.

<sup>28</sup> In re Hess, 136 Fed. Rep. 988,
 14 Am. B. R. 826, s. c. 134 Fed. Rep. 109, 14 Am. B. R. 559; In re Levin,
 131 Fed. Rep. 388, 11 Am. B. R. 382.
 <sup>29</sup> Counselman v. Hitchcock, 142
 U. S. 562, 35 L. Ed. 1110; Burrell v. Montana, 194 U. S. 572, 48 L.

Ed. 1122, 12 Am. B. R. 132; Matter of Harris, 221 U. S. 274.

<sup>30</sup> B. A. 1898, Sec. 7a, clause 9. See Sec. 673, post; In re Hess, 134 Fed. Rep. 109, 14 Am. B. R. 559, 136 Fed. Rep. 988; Burrell v. Montana, 194 U. S. 572, 48 L. Ed. 1122, 12 Am. B. R. 132.

Evidence of a trustee in bank-ruptcy that he found the goods claimed to be concealed without any assistance from the bankrupt and that the bankrupt had never told him where they were was admissible by itself, although if the record had shown that specific reference was being made to the trustee's examination of the bankrupt, the decision might have been different. Johnson v. United States (C. C. A. 1st Cir.), 170 Fed. Rep. 581, 95 C. C. A. 661, 22 Am. B. R. 359.

on the ground that the matter contained therein might tend to incriminate him.<sup>32</sup> He has been required to produce his books when testimony was introduced to show that they disclose nothing of an incriminating character,<sup>33</sup> or the referee may personally examine the books to ascertain whether they contain incriminating matter.<sup>34</sup>

It has been held that he may be required to state whether he has played cards or faro or any other games of chance with certain persons prior to the proceedings in bankruptcy, although the answer may tend to degrade him.<sup>35</sup> The bankrupt must plead his privilege, if any privilege legally exists, to the particular questions propounded.<sup>36</sup>

The alleged bankrupt can not be required to submit himself to an examination before trial as to his sanity, where insanity at the time of the commission of the alleged act of bankruptcy is in quéstion.<sup>37</sup>

## § 626. For malice or curiosity.

Where an examination is sought or carried on for the purpose of gratifying malice or mere curiosity, it may be arrested.<sup>38</sup>

# § 627. Upon what topics witnesses other than bankrupt may be examined—Immunity.

When a witness is brought before the referee he may be examined concerning "the acts, conduct, or property of a bankrupt whose estate is in the process of administration." <sup>38\*</sup>

32 Matter of Harris, 221 U. S.
 274; In re Sapiro, 92 Fed. Rep. 340,
 1 Am. B. R. 296 But see United
 States v. Goldstein, 132 Fed. Rep.
 789, 12 Am. B. R. 755.

<sup>28</sup> In re Hess, 136 Fed. Rep. 988,
14 Am. B. R. 826, 134 Fed. Rep. 109,
14 Am. B. R. 559.

84 Matter of Harris, 221 U. S. 274, Matter of Hark Bros., 136 Fed. 986, 14 Am. B. R. 624.

<sup>35</sup> In re Richards, No. 11769 Fed. Cas., 4 Ben. 303. But see In re Feldstein, 103 Fed. Rep. 269, 4 Am. B. R. 321.

<sup>36</sup> Burrell v. Montana, 194 U. S.
572, 48 L. Ed. 1122, 12 Am. B. R.
132; In re Mellen, 97 Fed. Rep. 326,
3 Am. B. R. 226.

<sup>37</sup> In re Ward, 161 Fed. **755**, 20 Am. B. R. 482.

<sup>38</sup> In re Salkey, No. 12252 Fed. Cas., 5 Biss. 486.

<sup>38\*</sup> B. A. 1898, Sec. 21a, as amended Feb. 5, 1903, 32 Stat. at L. 797.
People's Bank v. Brown (C. C. A. 3d Cir.), 112 Fed. Rep. 652, 7 Am.
B. R. 475; In re Carley, 106 Fed.
Rep. 862, 5 Am. B. R. 554.

Such witnesses must answer all questions concerning the act, conduct, or property of the bankrupt, and their dealings with him, even though their answers may furnish evidence to be used in a civil case brought, or to be brought, on behalf of the trustee.<sup>39</sup> In respect to the subject prescribed by the statute upon which he may be examined, the parties are entitled to a full discovery and disclosure by him.<sup>41</sup> Thus a person who has purchased claims against a bankrupt may be examined in respect to the consideration paid therefor and where he obtained the money.<sup>42</sup> A president may be required to give the consideration of a judgment obtained by his bank.<sup>43</sup>

It is no excuse for not answering, that his answer would reveal his own private business unnecessarily, and possibly to his prejudice in another suit then pending.<sup>44</sup> A witness may be required to produce books of account and other papers relating to the affairs of the bankrupt.<sup>45</sup> But a person is not required to answer an irrelevant question not relating to any matter of fact in issue where the answer would tend to degrade him,<sup>46</sup> or produce books or papers not relevant to the affairs of the bankrupt.<sup>47</sup>

39 In re Fay, No. 4708 Fed. Cas., 3 Ben. 660; In re Pioneer Paper Co., No. 11178 Fed. Cas., 7 N. B. R. 250; Garrison v. Markley, No. 5256 Fed. Cas., 7 N. B. R. 246; In re Cliffe, 3 Am. B. R. 257, 97 Fed. Rep. 540. President of company sued to recover assets of bankrupt may be compelled to produce private memorandum book. In re E. S. Wheeler & Co. (C. C. A. 2d Cir.), 158 Fed. Rep. 603, C. C. A. 19 Am. B. R. 461; In re United States Graphite Co., 159 Fed. Rep. 300, 20 Am. B. R. 280. (Order here granted for the production of minute book of a corporation charged with an alleged fraud with the bankrupt estate.)

<sup>41</sup> In re Stuyvesant Bank, No. 13582 Fed. Cas., 6 Ben. 33; In re

Trask, No. 14141 Fed. Cas., 7 Ben. 60; In re Lathrop, No. 8106 Fed. Cas., 4 N. B. R. 93.

<sup>42</sup> In re Lathrop, No. 8106 Fed. Cas., 4 N. B. R. 93; In re Trask, No. 14141 Fed. Cas., 7 Ben. 60.

<sup>43</sup> In re Pioneer Paper Co., No. 11178 Fed. Cas., 7 N. B. R. 250.

44 In re Trask, No. 14141 Fed.
Cas., 7 Ben. 60; In re Danforth,
No. 3560 Fed. Cas., 1 Pa. Law J. 148.
45 In re Fixen & Co., 96 Fed.
Rep. 748, 2 Am. B. R. 822; In re
Carley, 106 Fed. Rep. 862, 5 Am.
B. R. 554.

<sup>46</sup> In re Lewis, No. 8312 Fed. Cas., 4 Ben. 67.

<sup>47</sup> In re Carley, 106 Fed. Rep. 862, 5 Am. B. R. 554; In re Romine, 138 Fed. Rep. 837, 14 Am. B. R. 785.

The amendment of 1903 provides "that the wife may be examined only touching business transacted by her and to which she is a party, and to determine the fact whether she has transacted or been a party to any business of the bankrupt." <sup>48</sup>

Although a witness is required to disclose all matters touching the trade, property, and conduct of a bankrupt, he is entitled to the usual privileges and exemptions in regard to answering questions. <sup>49</sup> The question of privileged communications most frequently arises with reference to attorneys at law. A person who claims to have acted as counsel for a bankrupt can not, on that ground, refuse to be sworn as a witness. <sup>50</sup>

Where an attorney claims his privilege the court should have him examined as to the circumstances to see whether he is entitled to it.<sup>51</sup> The privilege can not be interposed until a question is asked which invades the privilege. The privilege of attorneys extends only to information derived from their clients as such. Information derived from other persons, or sources, although derived or obtained while acting as attorney, is not privileged.<sup>52</sup> The principle of the rule does not apply to the discovery of facts within the knowledge of the attorney, which were not communicated or confided to him by his client, although he became acquainted with the facts while engaged in his professional duty as the attorney of the client.<sup>53</sup> Thus he may be required to answer questions

<sup>48</sup> B. A. 1898, Sec. 20a, as amended Feb. 5, 1903, 32 Stat. at L. 797. *In re* Foerst, 93 Fed. Rep. 190, 1 Am. B. R. 259; *In re* Worrell, 125 Fed. Rep. 159, 10 Am. B. R. 744.

<sup>49</sup> *In re* Kreuger, No. 7942 Fed. Cas., 2 Low, 182.

<sup>50</sup> In re Woodward, No. 17999 Fed. Cas., 4 Ben. 102.

<sup>61</sup> People's Bank v. Brown (C. C. A. 3d Cir.), 112 Fed. Rep. 652, 50
C. C. A. 411, 7 Am. B. R. 475.

<sup>52</sup> People's Bank v. Brown (C.C. A. 3d Cir.), 112 Fed. Rep. 652,

7 Am. B. R. 475; In re O'Donohoe, No. 10435 Fed. Cas., 3 N. B. R. 245; In re Bellis, No. 1274 Fed. Cas., 3 Ben. 386 (partial report only), 3 N. B. R. 199; In re Aspinwall, No. 591 Fed. Cas., 7 Ben. 433; Spenceley v. Schulenberg, 7 East. 357.

Privilege of attorney as witness does not cover facts learned from a third party. *In re* Ruos, 159 Fed. 252, 20 Am. B. R. 281.

<sup>63</sup> In re Ruos, 159 Fed. 252, 20 Am. B. R. 281.

in regard to the facts relating to a conveyance of land to and by him,<sup>54</sup> or the superintendence of an auction sale of a stock of goods and the disposition of the proceeds,<sup>55</sup> or whether he drew or directed the drawing of a certain deed,<sup>56</sup> or a certain declaration of trust between the bankrupt and certain persons named,<sup>57</sup> or whether at a certain date the witness received any checks drawn to the order of the bankrupt by a certain named person, and what disposition was made of such checks so received, or what affairs of the bankrupt were the subject of conversation between him and other persons.<sup>57</sup>

Where a witness declines to testify on the ground of privileged communication it is for the court, and not for the witness, to determine whether the communication is privileged.<sup>58</sup> For this purpose the witness may be subjected to such questions as may be necessary to enable the court to determine the question.

A person other than the bankrupt can not be compelled to give testimony which may tend to incriminate him.<sup>59</sup>

## § 628. Contempt proceedings on failure to answer.60

Where one properly summoned refuses to appear for examination, <sup>61</sup> or fails to produce books, <sup>62</sup> or refuses to answer a question when ordered to do so by the referee, the matter may also be brought to the attention of the judge upon application to commit for contempt, <sup>63</sup> or if he makes an un-

54 In re Bellis, No. 1274 Fed. Cas.,
 3 Ben. 386 (partial report only),
 3 N. B. R. 199.

<sup>55</sup> In re O'Donohue, No. 10435 Fed. Cas., 3 N. B. R. 245.

<sup>56</sup> In re O'Donohue, No. 10435 Fed. Cas., 3 N. B. R. 245.

<sup>67</sup> In re Aspinwall, No. 591 Fed. Cas., 7 Ben. 433.

Fed. Rep. 652, 7 Am. B. R. 475.

<sup>59</sup> In re Smith, 112 Fed. Rep. 509,
 7 Am. B. R. 213.

<sup>60</sup> As to contempt, see further Sec. 669, et seq.

<sup>61</sup> In re Sorkin, 166 Fed. 831, 20 Am. B. R. 637 (bankrupt).

62 In re Alper, 162 Fed. 207, 19
 Am. B. R. 612; In re Sorkin, 166
 Fed. 831, 20 Am. B. R. 637.

68 B. A. 1898, Sec. 41a and b; In re Romine, 138 Fed. Rep. 837, 14 Am. B. R. 785. Suppression of depositions is not the remedy in bankruptcy for the refusal to testify. H. Scherer & Co. v. Everest (C. C. A. 8th Cir.), 168 Fed. Rep. 822, 94 C. C. A. 346; Ex parte Bick, 155 Fed. 908, 19 Am. B. R. 68. Here the bankrupt said he had only

satisfactory answer which is untrue, as that "he does not remember," or "is unable to tell," <sup>66</sup> or answers evasively <sup>67</sup> the court may commit him for contempt.

In England it has been held that a bankrupt may be committed by the court for answers upon his examination, which on the whole are unsatisfactory, and which do not really and truly impart information, which the bankrupt must possess; as where his answers are so clearly of an improbable character that they can not be believed.<sup>69</sup>

The duty of the bankrupt when examined under the act involves the duty of answering truthfully and as intelligently, connectedly, and fully as his mental equipment will permit. To In one case To bankrupts were committed for contempt because they refused to account for more than twenty thousand dollars' worth of property which had been traced

\$1.50 in his pockets and later produced \$100.00 in money. This was held to be a contempt. Re Gordon, 167 Fed. Rep. 239, 21 Am. B. R. 290; Re Schulman, 167 Fed. 237, 21 Am. B. R. 288.

66 In re Gitkin, 164 Fed. Rep. 71,21 Am. B. R. 113.

<sup>67</sup> Ex parte Bick, 155 Fed. Rep. 908, 19 Am. B. R. 68 (evasive answers); In re Singer, 174 Fed. Rep. 208, 23 Am. B. R. 28.

Where the bankrupt by answers of "I don't remember and "What do you mean?" given in response to questions as to matters with which he must have been familiar, in effect refuses to disclose all information which would enable the trustee to follow his property, an order adjudging him in contempt of court for refusing to answer questions and for concealing from his creditors all material facts as to his property was proper. It is immaterial that he was adjudged in contempt before the conclusion of his direct testimony, and before he was

cross-examined. *In re* Schulman (C. C. A. 2d Cir.), 177 Fed. Rep. 191, 101 C. C. A. 361.

69 Ex parte Lord, 16 Mees & W. 462; In re Bradbury, 11 Jur. 189, 14 C. B. 15; In re Taylor, 8 Ves. 328; Ex parte Nowlan, 6 Durn. & East, 58, 6 T. R. 118. As to power of the English rule upon American cases, see In re Mooney, No. 9748 Fed. Cas. 14 Blatch. 204.

<sup>70</sup> Professed ignorance of details of which the bankrupts must have been cognizant is a good ground for contempt proceedings. *In re* Magen, 179 Fed. 572, 24 Am. B. R. 63.

<sup>71</sup> In re Salkey, No. 12253 Fed. Cas., 6 Biss. 269, affirmed on petition for habeas corpus to discharge the prisoners, No. 12254 Fed. Cas., 6 Biss. 280.

Consult also In re How. No. 6747 Fed. Cas., 18 N. B. R. 565; In re Dresser, No. 4077 Fed. Cas., 3 N. B. R. 557; In re Mooney, No. 9748 Fed. Cas., 14 Blatch. 204. into their possession. Where a bankrupt withdraws from the office of the referee before the completion of his examination, he may be punished for contempt.<sup>72</sup> It has been held that a state court has no jurisdiction to punish a party for perjury committed in the course of an examination before a referee.<sup>72\*</sup>

# § 629. When testimony may be used in subsequent proceedings.

Testimony taken upon the examination of the bankrupt is taken in the whole pending proceeding and may be introduced and read upon the hearing of a petition for a discharge,<sup>73</sup> and the books of the bankrupt may be properly used to assist in the prosecution of the bankrupt in the state court.<sup>74</sup>

Parties in interest are entitled to examine the testimony of a bankrupt and to buy a copy of it. 75

The testimony of officers of a bankrupt corporation has been admitted in a subsequent proceeding by the trustee, to

<sup>72</sup> In re Vogel, No. 16984 Fed. Cas., 5 N. B. R. 393.

72 \* State v. Pike, 15 N. H. 83. Consult Commonwealth v. Walker, 108 Mass. 309

73 In re Wilcox (C. C. A. 2d Cir.), 109 Fed. Rep. 628, 6 Am. B. R. 362; In re Wiesen Bros., 135 Fed. Rep. 442, 14 Am. B. R. 347; In re Alphin & Lake Cotton Co., 131 Fed. Rep. 824, 12 Am. B. R. 653; In re Cooke, 109 Fed. Rep. 631, 5 Am. B. R. 434; In re Bard, 108 Fed. Rep. 208, 5 Am. B. R. 810. 74 In re Tracy & Co., 177 Fed. Rep. 532, 24 Am. B. R. 539.

<sup>75</sup> In re Samuelsohn, 174 Fed. Rep. 911, 23 Am. B. R. 538, Judge Hazel said: "It is urged in opposition to permitting the petitioner to examine the testimony of the bankrupts that the interest of the petitioner and the trusts are antag-

onistic, and that he intends to bring suit against such petitioner to recover preferences given him by the bankrupts, and therefore a disclosure of the testimony of the bankrupts, who are hostile to the interests of the bankrupt estate, may result prejudicially to the creditors. This contention, however, is not maintainable, in view of the absolute right which a party in interest has to examine a bankrupt, and the right which he has to be informed concerning the estate by the trustee or referee. An order may be entered directing the trustee to file the testimony with the referee, and that the petitioner herein, or his attorneys, may be allowed an inspection of the same, and upon payment of the usual fees may receive a copy thereof."

require them to surrender money or property of the estate alleged to be under their control. But the testimony of persons other than the bankrupt is not admissible in subsequent proceedings or upon the hearing of a petition for a discharge. Where a claimant was not in fact a party and could not exercise the right of cross-examination at the time the witnesses were examined, the witnesses, including the bankrupt, must be recalled unless the party consents to the use of the testimony as it appears in the proceedings. The state of the state of the state of the testimony as it appears in the proceedings.

So it appears that testimony taken in one proceeding can not be used as evidence in another proceeding except by the consent of parties.<sup>80</sup> Evidence taken before a referee in bankruptcy may be used in civil suits pending in either state or federal courts for the purpose of impeaching a witness,<sup>81</sup> either the bankrupt <sup>82</sup> or an adverse claimant.<sup>83</sup>

<sup>76</sup> In re Alphin & Lake Cotton Co., 131 Fed. Rep. 824, 12 Am. B. R. 653.

<sup>77</sup> In re Wiesen Bros., 135 Fed. Rep. 442, 14 Am. B. R. 347; In re Alphin & Lake Cotton Co., 131 Fed. Rep. 824, 12 Am. B. R. 653; In re Goodhile, 131 Fed. Rep. 782, 12 Am. B. R. 380.

In re Wilcox, 109 Fed. Rep. 628, 6 Am. B. R. 366, the circuit court of appeals of the second circuit said: "The testimony of third persons upon these roving attempts at discovery is not directed to a defined issue, and therefore the rules of evidence are not carefully applied, and testimony is liable to be given which is not carefully guarded and may be unconsciously derived from hearsay. Inasmuch as no issue has been framed, the bankrupt or his counsel can not always perceive the inferences which may be drawn from the testimony, and therefore will not produce rebutting facts. The danger in using the information which has thus been gathered in one of these 'fishing excursions,' as testimony upon which a court can rely in an issue between the bankrupt and his creditors, is such as to render its admission inexpedient. It is liable to produce an injustice, and the testimony may, therefore, be regarded as inadmissible."

78 In re Keller, 109 Fed. Rep. 118, 6 Am. B. R. 334. Evidence taken on examination of the bankrupt and other witnesses without notice that it would be used against the claimant can not be used against him. In re Hersey, 171 Fed. Rep. 1004, 22 Am. B. R. 856, 860, 863. 80 In re Rosenberg, 116 Fed. Rep.

80 In re Rosenberg, 116 Fed. Rep. 402, 8 Am. B. R. 624.

<sup>81</sup> Knowlton v. Mosely, 105 Mass. 136.

82 The examination of the bankrupt is admissible not as against the preferred creditor, but only to impeach the bankrupt in the action to set aside the preference. Congleton v. Schreihofer, — N. J. Chan. 1903, 54 A. 144.

83 Congleton v. Schreihofer, - N. J. Chan. 1903, 54 A. 144.

#### CHAPTER XXXII.

#### BANKRUPT-DUTIES-ETC.

SEC.		SEC.	
630.	Who is a bankrupt.	641.	Habeas corpus.
631.	Duty to attend meetings.	642.	Extradition of bankrupts.
632.	Duty to comply with the orders of the court.	643.	Proceedings to remove a bankrupt from one district to another.
	Duty with respect to claims against his estate.	644.	Proceedings before a United States commissioner.
634.	Duty to execute papers.	645.	An indictment as evidence.
635.	Duty to prepare a schedule of his debts and assets.	646.	Proceedings before the judge for an order of removal.
636.	Duty to submit to an examination.	647.	The order of court granting or
637.	When a bankrupt may be arrested.		refusing a warrant.
638.	Ne exeat,	648.	Abatement of bankruptcy proceed-
	Protection from arrest.		ings.
	Proceedings to release a bankrupt from imprisonment.		S

#### § 630. Who is a bankrupt.

The word "bankrupt" as used in the bankrupt act is defined to "include a person against whom an involuntary petition or an application to set a composition aside or to revoke a discharge has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt." <sup>1</sup>

## § 631. Duty to attend meetings.

The bankrupt must attend the first meeting of his creditors, if directed by the court, or a judge thereof, to do so.<sup>2</sup> But he is not required to attend the first or any subsequent meeting <sup>3</sup> of his creditors unless specially ordered to do so. And in no case can he be required to attend such meeting at a place more than one hundred and fifty miles distant from his home or principal place of business.<sup>4</sup> The bankrupt is entitled to his actual expenses from the estate when re-

<sup>&</sup>lt;sup>1</sup> B. A. 1898, Sec. 1, clause 4. <sup>2</sup> B. A. 1898, Sec. 7, clause 1; *In re* Eagles, 99 F. 695, 3 Am. B. R. 733.

<sup>&</sup>lt;sup>3</sup> See *In re* Dumahaut, No. 4124 Fed. Cas., 15 Blatch, 20.

<sup>&</sup>lt;sup>4</sup> B. A. 1898, Sec. 7 (proviso clause).

quired to attend at any place other than the city, town, or village of his residence.<sup>5</sup> But he can not be allowed illegitimate expenses, for gambling and traveling expenses.<sup>6</sup>

It is the duty of the bankrupt to attend the hearing upon his application for a discharge, if filed, without an order of court, or service of notice, or process.<sup>7</sup> He can not object to attending on account of the distance, where the hearing is at the regular place of holding court.

### § 632. Duty to comply with the orders of the court.\*

It is expressly made the duty of the bankrupt to comply with all lawful orders of the court.<sup>8</sup> The courts of bankruptcy are empowered to enforce obedience by bankrupts to such orders by fine or imprisonment or by fine and imprisonment.<sup>9</sup>

An order of court "does not mean a written order always, but only an exercise of authority constituting a requirement." <sup>10</sup> Where an order has actually been made by the court, including a referee, <sup>11</sup> it is binding upon the bankrupt until it is set aside or reversed, even though the court making it is without jurisdiction. <sup>12</sup> It is not for the bankrupt to decide whether the order is lawful or not, and then act according to his own decision, <sup>18</sup> or under the advice of counsel. <sup>14</sup> Where a bankrupt has used due diligence to

- <sup>5</sup> B. A. 1898, Sec. 7 (proviso clause).
- <sup>6</sup> In re Tudor, 100 Fed. Rep. 796, 4 Am. B. R. 78; In re Wilson, 116 Fed. Rep. 419, 8 Am. B. R. 612.
- <sup>7</sup> B. A. 1898, Sec. 7, clause 1; *In re* Shanker, 138 Fed. Rep. 862, 15 Am. B. R. 109.
- \*As to proceedings in contempt for disobedience, see *post*, Sec. 675. .\*B. A. 1898, Sec. 7, clause 2. Compare R. S. Sec. 5104.
- <sup>9</sup> B. A. 1898, Sec. 2, clause 13. See Contempt, Chap. XXXIV.
- <sup>10</sup> Bridges v. Sheldon, 7 Fed. Rep. 45.

- <sup>11</sup> B. A. 1898, Sec. 1, clause 7, and Sec. 41.
- <sup>12</sup> Wagner v United States, (C. C. A. 6th Cir.), 104 Fed. Rep. 133, 4
  Am. B. R. 596; Worden v. Searles,
  121 U. S. 14, 30 L. Ed. 853; *In re* Eaton, 51 Fed. Rep. 804.
- <sup>13</sup> See Atlantic Giant Powder Co.v. Dittman Co., 9 Fed. Rep. 317.
- <sup>14</sup> Burr v. Kimbark, 29 Fed. Rep. 432; United States v. Memphis, etc., R. R. Co., 6 Fed. Rep. 238; Goodyear v. Muller, No. 5577 Fed. Cas., 5 Blatch. 429; Ulman v. Ritter, 72 Fed. Rep. 1000; Societe v. Western Distilling Co., 42 Fed. Rep. 96.

comply with an order of court he is not guilty of contempt.<sup>15</sup> He will not be punished for contempt for refusing to turn over property to his trustee if he shows that the property is not in his possession or under his control.<sup>16</sup>

A person is subject to the orders of a court of bankruptcy whenever he has been duly served with process or a legal notice, or whenever he has voluntarily submitted himself to the jurisdiction of the bankruptcy court. This he may do by filing a petition,<sup>17</sup> or by proving a debt,<sup>18</sup> or by entering a voluntary appearance.<sup>19</sup>

The statute expressly authorizes a court of bankruptcy to make the order adjudging a person to be a bankrupt; <sup>20</sup> to direct him to attend meetings of creditors <sup>21</sup> and to examine claims, <sup>22</sup> to execute papers, <sup>23</sup> or order him to be arrested and kept in custody, <sup>24</sup> or to appear for examination; <sup>25</sup> and generally to make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of the act. <sup>26</sup>

Thus the court may order a bankrupt to deliver to the trustee money or other property, which is properly a part of his assets and apparently in his possession.<sup>27</sup> But such order should not direct a commitment in case of failure to comply with it without giving the defendant a day in court

<sup>15</sup> In re Carpenter, No. 2427 Fed. Cas., 1 N. B. R. 299.

16 Boyd v. Glucklich (C. C. A. 8th Cir.), 116 Fed. Rep. 131, 8 Am.
B. R. 393; Ex parte Comingor (C. C. A. 6th Cir.), 107 Fed. Rep. 898.
5 Am. B. R. 537, affirmed, 184 U. S.
18, 46 L. Ed. 413, 7 Am. B. R. 421; In re Cole (C. C. A. 1st Cir.), 144 Fed. Rep. 392, 16 Am. B. R. 302.

<sup>17</sup> In re Harris, 3 N. Y. Leg. Obs. 152.

18 In re Kyler, No. 7956 Fed. Cas.,2 Ben. 414.

<sup>19</sup> In re Ulrick, No. 14327 Fed. Cas., 3 Ben. 355; In re Kirtland,

No. 7851 Fed. Cas., 10 Blatch. 515.

<sup>20</sup> B. A. 1898, Sec. 2, clause 1.

<sup>21</sup> B. A. 1898, Sec. 7, clause 1.

<sup>22</sup> B. A. 1898, Sec. 7 (next to last clause).

<sup>23</sup> B. A. 1898, Sec. 7, clause 4.

<sup>24</sup> B. A. 1898, Sec. 9.

<sup>25</sup> B. A. 1898, Sec. 7, clause 9, and Sec. 21a.

<sup>26</sup> B. A. 1898, Sec. 2, clause 15.

Schweer v. Brown (C. C. A. 8th Cir.), 130 Fed. Rep. 329, 12
Am. B. R. 178; In re Rosser (C. C. A. 8th Cir.), 101 Fed. Rep. 562, 4
Am. B. R. 153; Ripon Knitting Wks. v. Schreiber, 101 Fed. Rep. 810, 4

with reference to that part of the order.<sup>28</sup> The different lawful orders which a court of bankruptcy may make with reference to the bankrupt are much too numerous to be collated at this point, even if it were possible to do so. When such an order is made it is the duty of the bankrupt to comply with its terms.

#### § 633. Duty with respect to claims against his estate.

It is made the duty of the bankrupt to examine the correctness of all proofs of claims filed against his estate.<sup>29</sup> But he can not be required to examine them except when presented to him, unless ordered by the court, or a judge thereof, for cause shown.<sup>30</sup> In case any person has to his knowledge proved a false claim against his estate it is his duty to disclose that fact immediately to his trustee.<sup>31</sup> In fact, it is his duty immediately to inform his trustee of any attempt, by his creditors or other persons, to evade the provisions of the act, coming to his knowledge.<sup>32</sup>

## § 634. Duty to execute papers.

It is the duty of the bankrupt to execute and deliver such papers as may be ordered by the court.<sup>33</sup>

Under this provision the court may order the bankrupt to execute and deliver to the trustee the proper papers, to enable him to prosecute or defend suits pending in the state

Am. B. R. 299: In re Schlesinger (C. C. A. 2d Cir.), 102 Fed. Rep. 117, 4 Am. B. R. 361; In re Wilson, 116 Fed. Rep. 419, 8 Am. B. R. 612; In re Greenberg, 106 Fed. Rep. 496, 5 Am. B. R. 840; In re Purvine (C. C. A. 5th Cir.), 96 Fed. Rep. 192, 2 Am. B. R. 787; In re Felson, 124 Fed. Rep. 288, 10 Am. B. R. 716; In re Miller, 105 Fed. 57, 5 Am. B. R. 184.

<sup>28</sup> In re Cole (C. C. A. 1st Cir.), 144 Fed. Rep. 392, 16 Am. B. R.

302; In re Davison, 143 Fed. Rep. 673, 16 Am. B. R. 337; In re Hershkowitz, 136 Fed. Rep. 950, 14 Am. B. R. 86.

<sup>29</sup> B. A. 1898, Sec. 7, clause 3.
 <sup>30</sup> B. A. 1898, Sec. 7 (last clause but one).

<sup>31</sup> B. A. 1898, Sec. 7, clause 7; *In re* Ankeny, 100 Fed. Rep. 614, 4 Am. B. R. 72.

<sup>32</sup> B. A. 1898, Sec. 7, clause 6.
 <sup>33</sup> B. A. 1898, Sec. 7, clause 4.
 Compare R. S. Sec. 5051.

courts, in his own name in the same manner and with the like effect as they might have been prosecuted or defended by the bankrupt, <sup>34</sup> or may order him on summary proceedings to sign an application for transfer of a liquor license sold by the trustee. <sup>35</sup>

As the bankrupt statute has no extra-territorial effect, real estate situated in a foreign country does not vest in the trustee by virtue of the act.<sup>36</sup> It is therefore made the duty of the bankrupt to execute to his trustee transfers of all of his property in foreign countries.<sup>37</sup>

#### § 635. Duty to prepare a schedule of his debts and assets.

For the purpose of advising the court, its officers and persons interested in his estate, the bankrupt is required to file a statement of his financial condition.<sup>38</sup>

The act makes it his duty to "prepare, make oath to, and file in court within ten days, unless further time is granted, after the adjudication, if an involuntary bankrupt, and with the petition if a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail, and a list of his creditors, showing their residences, if known, if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to, all in triplicate, one copy of each for the clerk, one for the referee, and one for the trustee.<sup>88</sup>

A neglect to file schedules may be punished by fine and imprisonment on summary proceedings.<sup>39</sup> An order to show

<sup>34</sup> See *In re* Clark, No. 2798 Fed. Cas., 4 Ben. 88; Clark v. Binninger, 39 How. Prac. 363; Samson v. Burton, No. 12285 Fed. Cas., 5 Ben. 325.

<sup>35</sup> In re Wiesel, 173 Fed. Rep. 718, 23 Am. B. R. 59.

<sup>36</sup> See Sec. 373, ante; Oakey v. Bennett, 11 How. 33, 13 L. Ed.

593; Barnett v. Poole, 23 Texas, 517.

<sup>37</sup> B. A. 1898, Sec. 7, clause 5. See Sec. 373, ante.

<sup>38</sup> See Sec. 173, ante; B. A. 1898, Sec. 7, clause 8, See Secs. 174 to 180, ante.

In re Brady, 21 Am. B. R. 364.

39 In re Schulman & Goldstein,
164 Fed. 440, 20 Am. B. R. 707.

cause why a bankrupt should not be compelled to file his schedules may be granted without notice to him. The order itself is notice and *per se* gives him his day in court.<sup>40</sup>

The requisites of a schedule are further considered in connection with the proceedings in voluntary and involuntary bankruptcy.<sup>41</sup>

# § 636. Duty to submit to an examination.

It is made the duty of the bankrupt, when present at the first meeting of his creditors, and at such other times as the court shall order, to submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding.<sup>42</sup> This subject is further considered in another place.<sup>43</sup>

# § 637. When a bankrupt may be arrested.

A bankrupt may be arrested upon a criminal process issued from a court of bankruptcy, or other court of the United States, or a state court.

His exemption is limited to arrests on civil process.<sup>44</sup> Power is expressly conferred upon the courts of bankruptcy,<sup>45</sup> and the circuit courts,<sup>46</sup> to arraign, try, and punish bankrupts for violations of the bankrupt statute. There is no limitation or restriction upon state courts with respect to arrests or punishment of bankrupts convicted of crimes or misdemeanors under the state laws.<sup>47</sup>

40 In re Schulman & Goldstein,
 164 Fed. Rep. 440, 20 Am. B. R.
 707; In re Brady, 21 Am. B. R. 364.
 41 Chap. XII. See also In re

41 Chap. XII. See also *In re* Soper, 1 Am. B. R. 193; Gen. Ords. V. and IX.

<sup>42</sup> B. A. 1893, Sec. 7, clause 9. <sup>43</sup> See Examination of the Bank

<sup>43</sup> See Examination of the Bankrupt, Chap. XXXI, ante.

As to offenses, see post, Sec. 649, et seq.

44 B. A. 1898, Sec. 9.

<sup>45</sup> B. A. 1898, Sec. 2, clause 4, and Sec. 29.

<sup>46</sup> B. A. 1898, Sec. 23c.

<sup>47</sup> See Stockwell v. Silloway, 105 Mass. 517.

A bankrupt may be arrested upon civil process, either mesne or final, in three classes of cases.

FIRST: FOR CONTEMPT.—A bankrupt may be arrested upon civil process, when issued from a court of bankruptcy, for contempt or disobedience of its lawful orders. This includes contempt committed before a referee and the disobedience of a lawful order, process, or writ of a referee. The power to enforce obedience by bankrupts to all lawful orders, by fine or imprisonment, or by fine and imprisonment, is expressly conferred upon courts of bankruptcy. Thus, the bankrupt is brought, at all times, within the control and disposition of the court.

SECOND: Upon a Debt not Released by a Discharge.— A bankrupt may be arrested upon civil process, issued from a state court having jurisdiction, and served within such state, upon a debt or claim from which his discharge in bankruptcy would not be a release, and in such case he is exempt from such arrest when in attendance upon a court of bankruptcy or engaged in the performance of a duty imposed by the act.<sup>51</sup> Such arrests can be made only in states where such proceedings are authorized by the state law.

In order that a bankrupt may be arrested on civil process issued by a state court, first, it must be served within the state in which the court issuing is held; and, second, the suit must be founded upon a debt or claim from which a discharge in bankruptcy will not release him. The statute provides 52 that "a discharge in bankruptcy shall release a

<sup>48</sup> B. A. 1898, Sec. 9a.

See further Sec. 675, et seq.

<sup>49</sup> B. A. 1898, Sec. 41*a*, and Sec. 2, clause 16.

"Its" equals "court's" and is defined to "mean the court of bank-ruptcy in which the proceedings are pending, and may include the referee." B. A. 1898, Sec. 1, clause 7.

<sup>50</sup> B. A. 1898, Sec. 2, clauses 13 and 16.

<sup>51</sup> B. A. 1898, Sec. 9a; In re Marcus (C. C. A. 1st Cir.), 105 Fed. Rep. 907, 5 Am. B. R. 365.

As to debts released by the discharge, see post, Sec. 699, et seq.

<sup>52</sup> B. A. 1898, Sec. 17. What debts are not discharged are further considered in another place. See Sec. 699, et seq., post.

bankrupt from all his provable debts,<sup>53</sup> except such as, *first*, are due as a tax levied by the United States, the state, county, district or municipality in which he resides; *second*, are liabilities for obtaining property by false pretenses, or false representations, or for willful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or criminal conversation; *third*, have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or, *fourth*, were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

Where the debt is one from which a discharge will not release the bankrupt, and the process is served within the state in which the court is held, he can not be relieved by a court of bankruptcy.<sup>54</sup>

This rule is subject to an important exception, namely, that a bankrupt can not be arrested when in attendance upon a court of bankruptcy, or engaged in the performance of a duty imposed by the act.<sup>55</sup>

The exemption is not restricted to particular occasions when the bankrupt's physical attendance in court is required, or he is actually engaged upon some required duty and the court may release him from arrest upon his furnishing bond to obey the orders of the court and not depart from the jurisdiction during the continuance of such exemption.<sup>56</sup>

<sup>58</sup> As to what debts are provable, see Chap. XIX.

54 In re Marcus (C. C. A. 1st Cir.), 105 Fed. Rep. 907, 5 Am. B. R. 365; In re Freche, 109 Fed. Rep. 620, 6 Am. B. R. 479; In re Glaser, No. 5474 Fed. Cas., 2 Ben. 180; In re Kimball, No. 7757 Fed. Cas., 2 Ben. 38; In re Seymour, No. 12684 Fed. Cas., 1 Ben. 348; In re

Patterson, No. 10817 Fed. Cas., 2 Ben. 155; In re Pettis, No. 11046 Fed. Cas., 7 Am. Law Reg. 695; Harter v. Harlan, 2 N. B. R. 238; In re Devoe, No. 3843 Fed. Cas., 1 Low. 251; In re Alsberg, No. 261 Fed. Cas., 16 N. B. R. 116.

<sup>56</sup> B. A. 1898, Sec. 9a, clause 2.
 <sup>56</sup> In re Dresser, 124 Fed. Rep.
 915, 10 Am. B. R. 270; In re Lew-

THIRD: For an Examination.—A bankrupt may be arrested under certain circumstances and held in custody for purposes of examination.<sup>57</sup>

#### . § 638. Ne exeat.

Owing to the very limited power of detention under section 9b, it may be necessary to resort to a writ of ne exeat to prevent persons departing from the jurisdiction.

A court of bankruptcy may issue a writ of *ne exeat* to restrain a bankrupt from departing out of the jurisdiction of the court, <sup>58</sup> whenever it may be necessary for the enforcement of the provisions of the bankrupt act, which the bankrupt may avoid by giving bond. <sup>59</sup>

## § 639. Protection from arrest.

A bankrupt is exempt from arrest upon civil process except in the following cases: First, when issued from a court of bankruptcy for contempt or disobedience of its lawful orders; second, when issued from a state court having jurisdiction, and served within such state, upon a debt or claim

ensohn, 99 Fed. Rep. 73, 3 Am. B. R. 594, affirmed, 104 Fed. Rep. 1004, 44 C. C. A. 309.

<sup>57</sup> B. A. 1898, Sec. 9b. Compare R. S. Sec. 5024. This topic is considered at length under Sec. 637, ante.

<sup>58</sup> B. A. 1898, Sec. 2, cl. 15; R. S.
Sec. 717; In re Cohen, 136 Fed.
Rep. 999, 14 Am. B. R. 355; In re
Lipke, 98 Fed. Rep. 970, 3 Am. B.
R. 569; Hoffschlaeger Co. v.
Young, Nap. 12 Am. B. R. 510.

59 In re Appel, 163 Fed. 1002, 20 Am. B. R. 890. (What is a breach of a bond given to release from arrest under a writ of ne exeat? Power of court of equity to "chancer" a bond.)

A creditors' petition was supby affidavits and certificate of the referee showing that the bankrupt had stated that he would not appéar at a certain date for further examination but intended to go West, and an order in the nature of a writ of ne exeat was issued commanding the marshal to take the bankrupt into custody, and cause him to give sufficient bail that he would not leave the jurisdiction without leave of court, and that he would comply with all orders of the court. The bankrupt gave bail and now moved that the order be vacated and the motion to vacate was denied. In re Berkowitz, 173 Fed. Rep. 1012, 23 Am. B. R. 227.

from which his discharge in bankruptcy would not be a release; and in such case he shall be exempt from such arrest when in attendance upon a court of bankruptcy or engaged in the performance of a duty imposed by the act.<sup>61</sup>

The object of this provision is obviously to protect a bankrupt from arrest in a suit founded on a debt from which a discharge in bankruptcy will be a release, 62 and it operates to render the bankrupt exempt under section 9a from arrest under process issued from the circuit court. 63

Where the bankrupt has an order of protection from arrest on civil process when he comes into the state for examination this is binding even on a creditor who holds a debt not dischargeable in bankruptcy.<sup>64</sup> A court of bankruptcy has no power to cause the arrest of a bankrupt for debt. A

61 B. A. 1898, Sec. 9a; Gen. Ord. 30. Compare R. S. Sec. 5107; In re Dresser, 124 Fed. Rep. 915, 10 Am. B. R. 270; In re Lewensohn, 99 Fed. 73, 3 Am. B. R. 594, affirmed in 104 Fed. Rep. 1006, 44 C. C. A. 309.

<sup>62</sup> Barrett v. Prince (C. C. A. 7th Cir.), 143 Fed. Rep. 302, 16 Am. B. R 64

General Ord, 30 provides for the release if a debtor is committed after the filing of his petition upon process in any civil action founded upon a claim provable in bankruptcy. It is clear that claims may be provable in bankruptcy which are not released by discharge. In this respect the general order must give way to the terms of the statute. This was the interpretation of general order 27 under the act of 1867, from which the language of general order 30 is evidently taken. In re Glaser, No. 4574 Fed. Cas., 2 Ben. 180, it was held that the provisions of general order 27, so far as they authorize the discharge, from arrest or imprisonment, of a bankrupt arrested on process founded on a claim provable in bankruptcy, where the claim was one from which his discharge in bankruptcy will not release him, were not warranted by the bankruptcy act of 1867.

That the bankrupt can not be released from imprisonment if the arrest is based upon any debt from which a discharge would not be a release, consult In re Kimball, No. 7767 Fed. Cas., 2 Ben. 38; In re. Whitehouse, No. 17564 Fed. Cas., 1 Low. 429; In re Migel, No. 9538 Fed. Cas., 2 N. B. R. 481; In re Kimball, No. 7769 Fed. Cas., 6 Blatch. 292, affirming No. 7768 Fed. Cas., 2 Ben. 554; In re Seymour, No. 12684 Fed. Cas., 1 Ben. 348; In re Robinson, No. 11939 Fed. Cas., 6 Blatch. 253; In re Patterson, No. 10817 Fed. Cas., 2 Ben. 155; In re Williams, No. 17700 Fed. Cas., 2 Biss. 233.

<sup>63</sup> In re Wenham, 153 Fed. 910.
 <sup>64</sup> United States v. Mansfield, 179
 Fed. 316, 23 Am. B. R. 204.

state court can cause the arrest of a bankrupt only on judgments not affected by bankruptcy proceedings, when such arrest is permitted by laws of the state where the process is issued and served.<sup>65</sup> In such cases he is exempt from such arrest when in attendance upon a court of bankruptcy or engaged in the performance of a duty imposed by the bankruptcy act. A bankrupt is not protected from arrest on execution on a judgment for costs rendered against him in a state court after adjudication in bankruptcy.<sup>66</sup>

The protection of a debtor from arrest upon civil process is co-extensive, in point of time, with the proceedings in bankruptcy. The exemption is limited to bankrupts. The protection begins as soon as the debtor is deemed bankrupt under the statute. The act itself defines the word "bankrupt" to "include a person against whom an involuntary petition or an application to set a composition aside or to revoke a discharge has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt.<sup>67</sup>

It is therefore clear that it is not necessary that the debtor shall have been adjudged a bankrupt. The protection from arrest begins immediately upon filing a petition, either in voluntary or involuntary bankruptcy. It extends during the whole period of the pendency of the proceedings in bankruptcy. The debtor is not entitled to protection from arrest, or to relief if arrested, by virtue of the provision quoted above, after the termination of the proceedings for discharge. 69

The protection of a bankrupt is expressly stated to be an exemption from arrest upon civil process. The exemption extends to arrests upon any civil process. There is no dis-

<sup>&</sup>lt;sup>85</sup> Knott v. Putnam, 107 Fed. Rep. 907, 6 Am. B. R. 80; *In re* Marcus (C. C. A. 1st Cir.), 105 Fed. Rep. 907, 45 C. C. A. 115, 5 Am. B. R. 365.

 <sup>66</sup> In re Marcus (C. C. A. 1st
 Cir.), 105 Fed. Rep. 907, 45 C. C.
 A. 115, 5 Am. B. R. 365.

<sup>&</sup>lt;sup>67</sup> B. A. 1898, Sec. 1, clause 4.
<sup>68</sup> In re Lewensohn, 99 Fed. Rep.
73, 3 Am. B. R. 594, affirmed, 104
Fed. Rep. 1006, 44 C. C. A. 309.

<sup>&</sup>lt;sup>69</sup> In re Kimball, No. 7768 Fed. Cas., 2 Ben. 554, 6 Blatch. 292; see also In re Dole, No. 3964 Fed. Cas., 11 Blatch. 499.

tinction between an arrest on mesne and final process, 70 or for contempt of a state court. 71

A stay by the bankruptcy court of proceedings in the state court stops contempt proceedings in the state court for a collection of the debt, 72 but not those prosecuted solely as a punishment for disregard of its authority. 73 But there is nothing in the statute to prevent a bankrupt being arrested and imprisoned upon criminal process. 74

The act does not suspend a state statute authorizing the arrest of a judgment debtor on the charge that he has concealed property.<sup>75</sup>

The protection afforded a bankrupt, by section 9 of the act, does not apply, where the arrest was made prior to the commencement of the bankruptcy proceedings, although he may be in custody, or in prison after the petition is filed. It is a bankrupt, and not a debtor, who is exempt from arrest. The bankrupt is exempt from arrest only and not from imprisonment. Section 9, therefore, does not authorize a court of bankruptcy to release a bankrupt from custody or imprisonment where he was arrested prior to the filing of the petition. Where the arrest is made after the petition is filed, the court may release him on a writ of habeas corpus. To

70 In re Wiggers, No. 17623 Fed. Cas., 2 Biss. 71; In re Mifflin, No. 9537 Fed. Cas. 1 Penn Law Jour. 146. <sup>71</sup> In re F. Stephen Grist, Referee, 1 Am. B. R. 89.

<sup>72</sup> In re Fortunato, 123 Fed. 622,9 Am. B. R. 630.

<sup>78</sup> In re Fritz, 152 Fed. 562, 18 Am, B. R. 244.

<sup>74</sup> See Stockwell v. Silloway, 105 Mass. 517.

76 Johnson v. Crawford & Yothers, 154 Fed. 761, 18 Am. B. R. 608.
 78 In re Claiborne, 109 Fed. Rep.
 74, 5 Am. B. R. 812; In re Walker,
 No. 17060 Fed. Cas., 1 Low. 222;

Hazelton v. Valentine, No. 6287 Fed. Cas., 1 Low. 270; Minon v. Van Nostrand, No. 9542 Fed. Cas., 1 Low. 458, affirmed in No. 9641 Fed. Cas., Holmes, 251; In re Cheney, No. 2636 Fed. Cas., 5 Law Rep. 19; In re Rank, No. 11566 Fed. Cas., Crabbe, 493; In re Hoskins, No. 6712 Fed. Cas., Crabbe, 466; Bank v. Hatch, 57 N. H. 460; Hussey v. Danforth, 77 Me. 17. But see People v. Erlanger, 132 Fed. Rep. 883, 13 Am. B. R. 197, and In re Seymour, No. 12684 Fed. Cas.

A bankrupt out on bail is deemed under arrest, to all intents and purposes, the same as if he had not been released upon bail.<sup>78</sup> He may be surrendered to the jailor by his bail. A court of bankruptcy can not, in such case, order his release. So also the restoring a debtor to confinement, from which he had obtained a temporary relief, pending an appeal, is not an arrest within the meaning of the clause under consideration.<sup>79</sup> And a jailor has the right to pursue a bankrupt, who has escaped, and retake him. Such a person is still, in law, and for the benefit of the jailor, considered to be in custody.<sup>80</sup>

## § 640. Proceedings to release a bankrupt from imprisonment.

A bankrupt may apply to a court of bankruptcy for a release from imprisonment, when he has been arrested after the commencement of proceedings in bankruptcy,<sup>81</sup> without giving bail.<sup>82</sup> It is immaterial whether the process for arrest was issued by a state or a federal court. It has been held that when the arrest is made by a state court the application for release should be made to that court, in order to avoid a conflict of jurisdiction.<sup>83</sup>

The refusal of a state court to grant a release can not be considered as final and binding.<sup>84</sup> It is the duty of the court

<sup>78</sup> In re Cheney, No. 2636 Fed. Cas., 5 Law Rep. 19; Hazleton v. Valentine, No. 6287 Fed. Cas., 1 Low. 270; In re Rank, No. 11566 Fed. Cas., Crabbe, 493; Stockwell v. Silloway, 100 Mass. 287. But see Foxall v. Levi, No. 5015 Fed. Cas., 1 Cranch. C. C. 139; Lingan v. Bayley, No. 8370 Fed. Cas., 1 Cranch. C. C. 112.

<sup>79</sup> Stockwell v. Silloway, 100 Mass. 287.

<sup>80</sup> Anderson v. Hampton, 1 B. & Ald. 308.

<sup>81</sup> In re Glaser, No. 5474 Fed. Cas., 2 Ben. 180; Ex parte Mifflin, No. 9537 Fed. Cas., 1 Penn. Law

J. 146; In re Winthrop, No. 17900 Fed. Cas., 5 Law Rep. 24; United States v. Dobbins, No. 14971 Fed. Cas., 5 Law Rep. 81; In re Wiggers, No. 17623 Fed. Cas., 2 Bliss. 71.

<sup>82</sup> United States *ex rel*. Kelley v. Peters, 166 Fed. Rep. 613, 22 Am. B R. 177. Arrest here was for an action for assault by school-teacher on pupil. Held a dischargeable debt.

88 In re O'Mara, No. 10509 Fed. Cas., 4 Biss. 506; In re Migel, No. 9538 Fed. Cas., 2 N. B. R. 481.

<sup>84</sup> In re Wiggers, No. 17623 Fed.
 Cas., 2 Biss. 71; In re Williams,
 No. 17700 Fed. Cas., 6 Biss. 233.

of bankruptcy to see that a suitor within its jurisdiction is protected in the manner contemplated by law. After a bankrupt has received his discharge in bankruptcy, the state court will, ordinarily, upon proper application, release him from arrest, <sup>85</sup> or the bankrupt may apply to the court of bankruptcy. <sup>86</sup>

A court of bankruptcy of one district may enjoin a creditor from proceeding with an arrest made in another district, if the creditor is within the jurisdiction of the court making the order.<sup>87</sup>

#### § 641. Habeas corpus.

If a bankrupt is unlawfully held in custody he may be released upon a writ of habeas corpus.<sup>88</sup>

The proper course to pursue is to apply for a writ of habeas corpus.89 General order 30 provides that if the debtor is "committed after the filing of his petition upon process in any civil action founded upon a claim provable in bankruptcy, the court may, upon like application, discharge him from such imprisonment. If the petitioner, during the pendency of the proceedings in bankruptcy, be arrested or imprisoned upon process in any civil action, the district court, upon his application, may issue a writ of habeas corpus to bring him before the court to ascertain whether such process has been issued for the collection of any claim provable in bankruptcy, and if so provable he shall be discharged; if not, he shall be remanded to the custody in which he may law-Before granting the order for discharge the fully be. court shall cause notice to be served upon the creditor or his

85 Jones v. Emerson, 1 Gaines (N. Y.) 487; Comstock v. Gibut, 17 Vt. 512.

<sup>86</sup> In re Simpson, No. 12879 Fed. Cas., 2 N. B. R. 47.

\* 87 Hazelton v. Valentine, No. 6287 Fed. Cas., 1 Low. 270.

88 General Ord. 30. In re Terrell,51 Fed. Rep. 213; United States v.

Fowkes, 49 Fed. Rep. 50, affirmed in 53 Fed. Rep. 13, (C. C. A. 3rd Cir.), 3 C. C. A. 394.

In Bagnall v. Ableman, 4 Wis. 163, a writ was granted by a state court releasing a prisoner in the custody of a U. S. marshal.

<sup>89</sup> Ex parte Williams, No. 17700 Fed. Cas., 6 Biss. 233.

attorney, so as to give him an opportunity of appearing and being heard before the granting of the order."

This general order, like general order 27 under the act of 1867, provides for a release when the debtor is committed in a civil action founded upon a claim provable in bankruptcy instead of claims released by a discharge as provided by the statute.90 In this respect the order and statute conflict, and the statute must control.91 The application for a writ is regularly made to the judge of the bankruptcy court by a petition signed by the bankrupt, for whose relief it is intended, setting forth the facts concerning his detention, in whose custody he is detained, and by virtue of what claim or authority, if known. The facts set forth in the complaint should be verified by the oath of the person making the application. The judge, to whom the application is made, will award a writ of habeas corpus, unless it appears from the petition itself that the party is not entitled to it.92 The writ. so issued, is directed to the person in whose custody the party is detained. The person to whom the writ is directed makes a return of it by certifying the true cause of the detention of the bankrupt. He then brings the bankrupt before the judge who granted the writ. A day is set for the hearing of the case. this hearing the bankrupt may deny any of the facts set forth in the return, or may allege any other facts that may be material in the case. Such denials or allegations should be made under oath. The return and all other suggestions made against it may be amended by the leave of the court before or after they are filed, so that thereby the material facts may be ascertained. The court or judge proceeds in a summary way to determine the facts of the case by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice requires.

Where the arrest is made upon process issued from a state

<sup>&</sup>lt;sup>90</sup> B. A. 1898, Sec. 9a. 'Compare Sec. 26 of the act of 1867, R. S. Sec. 5107.

<sup>&#</sup>x27;91 See protection from arrest, Sec. 639, ante.

<sup>92</sup> Ex parte Milligan, 4 Wall. 110, 18 L. Ed. 281.

court it is not clear how far a court of bankruptcy will go behind the face of the papers, if at all, to determine the questions of fact on which the petitioner's right to discharge or the creditor's right to continue the imprisonment depends. The statute contains no directions as to the specific evidence required. There is a conflict of authority on this point in the decisions under the act of 1867.

Some judges were of the opinion that the scope of inquiry should be limited to the question whether the state court has founded its arrest on a claim, which, on the face of the papers which were filed before it as the foundation for the arrest, was a claim from which the debtor would not be discharged in bankruptcy.<sup>93</sup>

The theory of this position was that the complaint or affidavits and facts stated therein in the state proceedings were binding upon the bankruptcy court. Judge Bradford, after referring to the cases tending to limit the scope of the inquiry, aptly observed: 94

"Where the liberty of the prisoner depends upon the fact that his debt is dischargeable by his discharge in bankruptcy, and he tenders proof to maintain the allegation, is it not a strange proposition that he shall be denied the right to prove his right to release from imprisonment, because an *ex parte* affidavit has been made in the state courts that he had contracted the debt under such circumstances of fraud as that his debt would not be released by his discharge in bankruptcy? This appears strange, because it affects the personal liberty of the bankrupt. But the rights of the creditors to arrest for debts not dischargeable in bankruptcy are equally sacred, and the proposition to me is equally strange that they should be denied the power to hold under arrest one legally arrested for other reasons filed than those which will

93 In re Valk, No. 16814 Fed. Cas.,
3 Ben. 431; In re Robinson, No.
11939 Fed. Cas., 6 Blatch. 253; In re Kimball, No. 7768 Fed. Cas., 2
Ben. 554, affirmed in No. 7769 Fed.

Cas., 6 Blatch. 292; In re Devoe, No. 3843 Fed. Cas. 1 Low. 251. 94 In re Alsberg, No. 261 Fed. Cas., 16 N. B. R. 116. release the debt, when they make the allegation, and offer to sustain it by proof, that the petitioner can not bring himself within the exemption from arrest granted by Congress, by reason of the fact that the debt on which he was arrested was contracted in fraud."

On the other hand, there were judges who thought that it was the duty of the court of bankruptcy to examine diligently all legal evidence brought before it, from any quarter whatever, tending to show that a debt not dischargeable by the discharge of the bankrupt, had or had not been contracted.<sup>95</sup>

The theory of this position was that the cases in which the bankrupt was exempt from arrest, and also cases in which the creditor was entitled to have his imprisonment continued, were expressly stated in the bankrupt law. The liability to imprisonment or immunity from the same depended upon whether the debt, for which the bankrupt was arrested by the state authority, was dischargeable or not by the discharge in bankfuptcy. It did not depend in any degree upon the reason or ground of arrest given in the affidavits filed in the state court. What was the nature of the debt, upon which the arrest was founded, was deemed a question which the bankruptcy court had a right to determine. The bankrupt law being paramount, and giving exclusive jurisdiction to the bankruptcy court, it was considered the duty of that court to see that a suitor within its jurisdiction was protected in the manner contemplated by The statements made in a declaration or complaint or affidavit filed in a state court were therefore held not to be binding upon the court of bankruptcy.

95 In re Williams, No. 17700 Fed. Cas., 6 Biss. 233; In re Alsberg, No. 261 Fed. Cas., 16 N. B. R. 116; In re Glaser, No. 5474 Fed. Cas., 2 Ben. 180; In re Kimball, No. 7767 Fed. Cas., 2 Ben. 38. Judge Blatchford, who decided these last two cases, afterwards expressly disapproved of his decision in these cases. See *In re* Kimball, No. 7768 Fed. Cas., 2 Ben. 554.

It should be observed, however, that where a judgment has been rendered in an action for fraud in a state court, the bankruptcy court is bound by the judgment.<sup>96</sup>

The bankruptcy court will not reverse the finding of a state court. In such cases the court will look to the record of the state court to see if material and traversable allegations of fraud appear, which must have been found true in order to render the judgment.

When a bankrupt is arrested upon civil process, issuing from a court of bankruptcy, pending bankruptcy proceedings, the order of the court should be to release the prisoner. The only exception to this rule is when the arrest and commitment is for contempt or disobedience of its lawful orders.

When the bankrupt is arrested, by the authority of the state law, and claims immunity and privilege from arrest, he must make it appear to the satisfaction of the court that his case comes within the exemption or privilege granted. If he does, he should be discharged from arrest. 97 If he does not, he should be remanded into custody. 98

If he makes it appear that his debt is dischargeable; that is, that it is not tainted with any of the kinds of frauds enumerated in section 17 of the act, which prevents its being released by the discharge of the bankrupt, or if the arrest was made when he was in attendance upon a court of bankruptcy, or engaged in the performance of a duty imposed by the act, he is within the exemptions extended by section 9. If he can not do this, he is not within the privilege or exemption, and must be remanded into custody.

<sup>96</sup> In re Patterson, No. 10817 Fed. Cas., 2 Ben. 155; In re Whitehouse, No. 17564 Fed. Cas., 1 Low. 429; Shuman v. Strauss, 52 N. Y. 404.

As to effects of judgment on discharge, see post, Sec. 802, et seq.

<sup>97</sup> Knott v. Putnam, 107 Fed. Rep. 907, 6 Am. B. R. 80.

98 In re Freche, 109 Fed. Rep. 620, 6 Am. B. R. 479; In re Claiborne, 109 Fed. Rep. 74, 5 Am. B. R. 812; In re Marcus (C. C. A. 1st Cir.), 105 Fed. Rep. 907, 45 C. C. A. 115, 5 Am. B. R. 365.

If a court of bankruptcy orders the release of a bankrupt in custody of a state officer, such officer is obliged to release him and can not be punished therefor by the state court. 99

Habeas corpus is not a method to review a commitment by the district court for contempt, and the circuit court has no jurisdiction over the district court to issue habeas corpus as to an order of the district court.<sup>100</sup>

## § 642. Extradition of bankrupts.\*

Whenever a warrant for the apprehension of a bankrupt has been issued, and he is found within the jurisdiction of a court other than the one issuing the warrant, he may be extradited in the same manner in which persons under indictment are extradited from one district within which a district court has jurisdiction to another.<sup>1</sup>

The extradition of a bankrupt may be required when a warrant is issued for his arrest, in case he is accused of or indicted for an offense under the bankrupt act, or in case he is charged with contempt, or for the purpose of detaining him for any examination. In order to support extradition proceedings it is necessary that a warrant shall have been issued for his arrest, and that he be found beyond the jurisdiction of the court issuing it and within the jurisdiction of another court of bankruptcy. Proceedings in extradition cases, under a treaty between the United States and a foreign government, stand on a wholly different footing.<sup>2</sup> Such proceedings are not expressly adopted by the bankrupt act.

99 In re Kimball, No. 7767 Fed.
Cas., 2 Ben. 38; Ex parte Hurst,
No. 6924 Fed. Cas., 1 Wash. C. C.
186, 4 Dall. 387; Lyell v. Goodwin, No. 8616, 4 McLean, 29;
Thomas v. Hudson, 13 Mees. & W.
353, 816, 884; Norton v. Walker,
3 Ex. 489.

100 Ex parte Bick, 155 Fed. 908,
 19 Am. B. R. 68. ●

\*Extradition for examination, see further Sec. 563, ante.

<sup>1</sup> B. A. 1898, Sec. 10 and Sec. 2, clause 14; *In re* Hassenbusch (C. C. A. 6th Cir.), 108 Fed. Rep. 35, 47 C. C. A. 177.

<sup>2</sup> R. S. Secs. 5270-5280; *In re* Henrich, No. 6369 Fed. Cas., 5 Blatch. 414; *In re* Manning, 44 Fed. Rep. 275.

The bankrupt statute adopts the provisions relating to transferring a person under an indictment, from one district to another. The only authority for holding a person under indictment, to bail in one district to answer in another district, or upon his failure to give bail to order him to be removed into another district where the offense is to be tried, is found in section 1014 of the Revised Statutes. This provision is as follows:

"For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any state where he may be found, and agreeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such a court, together with the recognizance of the witnesses for their appearance to testify in the case. where any offender or witness is committed in any district other than where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had."

When a warrant for the arrest of a bankrupt has been issued, and he is found in another district, he may be reached by proceedings under this section. He may be arrested there and transferred in the usual manner under this section. He can not, however, be arrested upon the warrant originally issued, because it will not run into another district.<sup>3</sup> All

<sup>\*</sup>Ex parte Graham, No. 5657 Manning, 44 Fed. Rep. 275; In re Fed. Cas., 3 Wash, C. C. 456; In re Dana, 68 Fed. Rep. 886.

proceedings for arrest, bail, commitment and removal are held in the district in which the bankrupt is found, and not in the district in which the original warrant was issued.<sup>4</sup>

# § 643. Proceedings to remove a bankrupt from one district to another.

The proceeding contemplated in section 1014 is an original and independent proceeding in the district where the bankrupt is found. It is based upon the order of court for a warrant or upon an indictment previously issued by the court having jurisdiction of the cause.4\*

The section expressly provides that the proceeding shall be "agreeably to the usual mode of process against offenders in such state." It seems that the effect of the section is to adopt the familiar common-law proceeding upon complaint for the arrest and commitment of offenders by the committing magistrate, subject to this provision, adopting procedure of the several states, which is, of course, itself subordinate to the provisions of the Constitution of the United States. Although the procedure is not exactly the same in all states, it is substantially so.

## § 644. Proceedings before a United States commissioner.

The proceedings are regularly instituted by a complaint under oath, made before a United States commissioner,<sup>6</sup> or any magistrate mentioned in section 1014.

<sup>4</sup> In re Dana, 68 Fed. Rep. 886; In re Manning, 44 Fed. Rep. 275; In re Burkhardt, 33 Fed. Rep. 25; United States v. Fowkes, 49 Fed. Rep. 50, affirmed, 53 Fed. Rep. 13, 3. C. C. A. 394; United States v. Brawner, 7 Fed. Rep. 86.

4\* United States v. Yarborough, 122 Fed. Rep. 293, the practice is fully explained. See also *In re*  Beshears, 79 Fed. Rep. 70; In re Graves, 29 Fed. Rep. 60.

<sup>5</sup> West v. Cabell, 153 U. S. 87, 38 L. Ed. 643, U. S. Const., 4th Amend't.

<sup>6</sup> United States v. Yarborough, 122 Fed. Rep. 293; *In re* Beshears 79 Fed. Rep. 70. For form of complaint, see Loveland's Forms of Federal Practice, No. 871. The oath may be made by any person having knowledge of the facts. The order of court, and a warrant furnished to the United States attorney for the district in which the bankrupt is found, is sufficient to justify a referee in bankruptcy or other person making the required affidavit. Thereupon the commissioner issues a warrant, directed to the marshal of the district, commanding him to arrest the bankrupt and bring him before a committing magistrate. A commissioner is not authorized to issue a warrant except upon a complaint on oath. An indictment found by a grand jury, in another district, is such a complaint on oath as is required to authorize a warrant for arrest.

The bankrupt is then arrested and brought before the commissioner. He thereupon pleads. If his plea is guilty he should be held to bail or committed. If his plea is not guilty he may waive examination or demand a hearing. Unless he waives examination he is entitled to a speedy hearing. At the examination before the commissioner evidence may be introduced for and against the bankrupt and counsel may be heard. The magistrate must determine the identity of the prisoner, and his probable guilt. If he is satisfied as to these two questions, it is his duty to admit the bankrupt to bail for trial before such court, as by law is cognizant of the offense.9 If the bankrupt fails to tender-a sufficient bail, the magistrate may then commit him to the custody of the marshal to await a warrant for his removal. If, on the other hand, there is no probable cause of his guilt or his identity is not established, the bankrupt is

<sup>6\*</sup> Castner v. Pocahontas Colliers Co., 117 Fed. Rep. 184.

<sup>&</sup>lt;sup>7</sup> The fourth amendment to the constitution of the United States provides that "no warrants shall issue but upon probable cause, supported by oath or affirmation." See United States v. Tureaud, 20 Fed. Rep. 621.

<sup>&</sup>lt;sup>8</sup> Beavers v. Henkel, 194 U. S.

<sup>73, 48</sup> L. Ed. 882; Benson v. Henkel, 198 U. S. 1, 49 L. Ed. 919. For form of warrant, see Loveland's Forms of Federal Practice, No. 872.

<sup>&</sup>lt;sup>9</sup> United States v. Jacobi, No. 15460 Fed. Cas., 1 Flip. 108; *In re* Bailey, No. 730 Fed. Cas., 1 Woodlw. 422; United States v. Shepard, No. 16273 Fed Cas., 1 Abb. U. S. 431.

entitled to be discharged by the commissioner. When the bankrupt is discharged or admitted to bail by the magistrate, extradition proceedings are at an end. Further steps are necessary only when the bankrupt is committed to custody.

## § 645. An indictment as evidence.

An indictment in a federal court is *prima facie* evidence of probable cause and sufficient basis for removal from the district where the person arrested is found to the district where the indictment was found.<sup>10</sup>

The extent to which a commissioner in extradition may inquire into the validity of an indictment by any evidence before him as proving the probable guilt has never been definitely settled, although the supreme court has held that technical objections should not be considered and that the legal sufficiency of the indictment is only to be determined by the court in which it is found.<sup>11</sup>

In Benson v. Henkle, 11\* the supreme court said: "Indeed, it is scarcely seemly for a committing magistrate to examine closely into the validity of an indictment found in a federal court of another district, and subject to be passed upon by such court on demurrer or otherwise. Of course, this rule has its limitations. If the indictment were a mere information, or obviously, upon inspection, set forth no crime against the United States, or a wholly different crime from that alleged as the basis for proceedings, or if such crime be charged to have been committed in another district from that to which the extradition is sought, the commissioner could not probably consider it as ground for removal. In such cases resort must be had to other evidence of probable cause.

<sup>10</sup> Beavers v. Henkel, 194 U. S.73, 48 L. Ed. 882.

<sup>11</sup> Benson v. Henkel, 198 U. S. 1,
 <sup>49</sup> L. Ed. 919; Beavers v. Haubert, 198 U. S. 77, 49 L. Ed. 919;
 Roberts v. Reilly, 116 U. S. 80, 96,
 <sup>29</sup> L. Ed. 544; Greene v. Henkel,

183 U. S. 249, 260, 46 L. Ed. 177; Ex parte Reggel, 114 U. S. 642, 650, 29 L. Ed. 250; Horner v. United States, No. 2, 143 U. S. 570, 577, 36 L. Ed. 266; Beavers v. Henkel, 194 U. S. 73, 87, 48 L. Ed. 882.

11\*198 U. S. 1, 49 L. Ed. 919.

"While the principle laid down in some of the earlier cases in this court, that an indictment upon a statute is ordinarily sufficient if framed in the language of the statutes has been somewhat qualified in later cases, the rule still holds good that where the statute contains every element of the offense, and an indictment is offered in evidence before the extradition commissioner as proof of probable cause, it is sufficient if framed in the language of the statute with the ordinary averments of time and place, and with such a description of the fraud, if that be the basis of the indictment, as will apprise an intelligent man of the nature of the accusation, notwithstanding that such indictment may be open to motion to quash or motion in arrest of judgment in the court in which it was originally found. An extradition commissioner is not presumed to be acquainted with the niceties of criminal pleading. His functions are practically the same as those of an examining magistrate in an ordinary criminal case, and if the complaint or the indictment offered in support thereof contains the necessary elements of the offense, it is sufficient, although a more critical examination may show that the statute does not completely cover the case."

## § 646. Proceedings before the judge for an order of removal.

When the bankrupt has been committed to the custody of the marshal, the United States attorney appears before the judge, usually attended by the marshal with the prisoner, and makes an application for an order or a warrant of removal. This should be done as soon as possible after the commitment by the commissioner.

The order or warrant of removal is not issued as a matter of course. It is the duty of the judge to determine judicially whether the prisoner ought to be taken to another district for trial or whether he is entitled to his freedom. The practice in the several districts is not uniform as to how far the judge will go in his inquiry before he takes action in the shape of an order, either granting or refusing the transfer

of the prisoner. He must, in any case, be satisfied with the proof of the identity of the prisoner. And if no opposition is made he may rely upon the finding of the commissioner in respect to probable cause of guilt. But he is not obliged to do so. The judge may allow an examination de novo before him upon the facts to determine this question.<sup>12</sup> At such a hearing it seems to be not only the right but the duty of the judge to look into the indictment and probably into an order of court so far as to be satisfied that an offense is charged, which may be lawfully tried in the forum to which it is claimed the accused should be removed.<sup>13</sup>

#### § 647. The order of court granting or refusing a warrant.

If the judge is satisfied with the proof of the identity of the prisoner and of the probable cause of his guilt, he issues an order or warrant for removal. This warrant is directed to the marshal of the district within which the prisoner is found and the extradition proceedings had. It commands him to remove the prisoner to the particular district where the offense is to be tried and deliver him to the United States marshal of the district or some other proper officer authorized to receive the prisoner. Only one writ or warrant is necessary to remove a prisoner from one district to another. A marshal of the district where the prisoner is found may deputize the marshal of the district in which the trial is to be held to execute the warrant of removal. 16

<sup>12</sup> In re Dana, 68 Fed. Rep. 886;
In re Wolf, 27 Fed. Rep. 606.

<sup>18</sup> United States v. Horner, 44
Fed. Rep. 677; Horner v. United
States, 143 U. S. 207, 36 L. Ed. 126;
Callan v. Wilson, 127 U. S. 540, 32
L. Ed. 223; In re Palliser, 136 U.
S. 261, 34 L. Ed. 514; In re Terrell, 51 Fed. Rep. 213; In re Doig,
4 Fed. Rep. 193; United States v.
Brawner, 7 Fed. Rep. 86; United
States v. Rogers, 23 Fed. Rep. 658.

<sup>14</sup> For form of warrant, see Loveland's Forms of Federal Practice, No. 872.

United States v. Horner, 143 U. S. 207, 36 L. Ed. 126; *In re* Burkhardt, 33 Fed. Rep. 25; United States v. White, 25 Fed. Rep. 716. <sup>15</sup> R. S. Sec. 1029.

<sup>16</sup> United States v. Fletcher, 147 U. S. 664, 37 L. Ed. 322.

> re Am.

If upon the hearing it appears that the removal should not be made, the judge will refuse the warrant and order the prisoner discharged.<sup>17</sup> He may admit the party to bail, and should do so if the party can furnish bail, and to this end he may reduce or increase the bail fixed by the commissioner.<sup>18</sup>

## § 648. Abatement of bankruptcy proceedings.

The death or insanity of a bankrupt does not abate the proceedings, but the same are conducted and concluded in the same manner, so far as possible, as though he had not died or become insane. *Provided*, that in case of death the widow and children shall be entitled to all rights of dower and allowance fixed by the laws of the state of the bankrupt's residence. Proceedings do not abate where a bankrupt died after filing of a petition and before the return day. In such cases time may be allowed the administrator and creditors to appear and answer the petition. Proceedings do not abate, where a corporation, pending bankruptcy proceedings against it, is dissolved by a state court. 21

The death or removal of a trustee does not abate any suit or proceeding which he is prosecuting or defending at the time of his death or removal, but the same may be proceeded with or defended by his joint trustee or successor in the same manner as though the same had been commenced or was being defended by such joint trustee alone or by such successor.<sup>22</sup>

<sup>17</sup> In re Dana, 68 Fed. Rep. 886;
 U. S. v. Rogers, 23 Fed. Rep. 658.

<sup>18</sup> United States v. Brawner, 7 Fed. Rep. 86; United States v. Rogers, 23 Fed. Rep. 661; *In re* Wolf, 27 Fed. Rep. 615.

19 B. A. 1898, Sec. 8. As to practice in case of insanity of bankrupt, see *In re* Burka, 107 Fed. Rep. 674, 5 Am. B. R. 843; *In re* Eisenberg, 117 Fed. Rep. 786, 8 Am. B. R. 551; *In re* Miller, 133 Fed. Rep. 1017, 13 Am. B. R. 345.

<sup>20</sup> In re Hicks, 107 Fed. Rep. 910, 6 Am. B. R. 182; In re Spalding (C. C. A. 2d Cir.), 137 Fed. Rep. 1020, 14 Am. B. R. 129; Shute v. Patterson, 147 Fed. Rep. 509. See In re Risteen, 122 Fed. Rep. 732, 10 Am. B. R. 494.

<sup>21</sup> Scheuer v. Smith and Montgomery Book Co. (C. C. A. 5th Cir.), 112 Fed. Rep. 407, 7 Am. B. R. 384.

<sup>22</sup> B. A. 1898, Sec. 46.

#### CHAPTER XXXIII.

#### OFFENSES.

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oou.	Indictment or information.		

### § 649. In general.

The bankrupt statute prescribes that certain acts shall constitute offenses, and provides penalties therefor.<sup>1</sup> The crimes or offenses defined in the act are misdemeanors,<sup>2</sup> as distinguished from felonies.

A person may be liable to prosecution under a state or federal law, if the offense has been committed in bankruptcy proceedings, as perjury. Where a person makes himself liable to such punishment or penalty, it is probable that he may be proceeded against under such state or federal statute or under the bankrupt act.<sup>3</sup> But he can not be punished twice for the same offense.

It will be observed that the present act does not make it an offense to obtain goods by false pretenses prior to being

Latorre, No. 15567 Fed. Cas., 8 Blatch, 134.

<sup>&</sup>lt;sup>1</sup> B. A. 1898, Sec. 29. Compare R. S. Sec. 5132.

<sup>&</sup>lt;sup>2</sup> United States v. Block, No. 14609 Fed. Cas., 4 Saw. 211; United States v. Prescott, No. 16084 Fed. Cas., 2 Biss. 325; United States v.

<sup>&</sup>lt;sup>8</sup> Commonwealth v. Walker, 108 Mass: 309. But see State v. Pike, 15 N. H. 83.

adjudged a bankrupt. It seems that Congress has left such offenses to be dealt with under the state law. The rule was otherwise under the act of 1867.4

## § 650. Misappropriation of property by the trustee.

It is made an offense under the bankrupt statute for any person knowingly and fraudulently to appropriate to his own use, embezzle, spend, or unlawfully transfer any property, or secrete or destroy any document belonging to a bankrupt estate which came into his charge as trustee.<sup>5</sup>

The object of this provision is to protect the bankrupt and the creditors in case of a dishonest trustee. But it should be observed that the perversion of the assets must be tainted with fraud or done unlawfully or with evil intent to be an offense. An honest mistake is not sufficient to warrant an infliction of the penalty, although the results to the assets are equally disastrous.

The penalty for this offense is imprisonment for a period not exceeding five years.<sup>6</sup>

A trustee can not be compelled to give testimony which may tend to show that he has misappropriated the funds of the bankrupt's estate.<sup>7</sup>

# § 651. Concealment of property by a bankrupt.

Another offense is to knowingly and fraudulently conceal while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy.<sup>8</sup> It is not an offense under this section to conceal from the "estate in bankruptcy" before a trustee has been appointed.<sup>9</sup> To conceal is defined by the act to "include secrete, falsify, and mu-

<sup>&</sup>lt;sup>4</sup> R. S. Sec. 5132, clauses 9 and 10.

<sup>&</sup>lt;sup>5</sup> B. A. 1898, Sec. 29a.

<sup>&</sup>lt;sup>6</sup> B. A. 1898, Sec. 29a.

<sup>&</sup>lt;sup>7</sup> In re Smith, 112 Fed. Rep. 509, 7 Am. B. R. 213.

<sup>&</sup>lt;sup>8</sup> B. A. 1898, Sec. 29b, clause 1. In re Goodman, 171 Fed. Rep. 287, 22 Am. B. R. 570; In re Sam-

uel Gross, 5 Am. B. R. 271. See charge to jury by Judge Brawley under this section in United States v. Levinson, 13 Am. B. R. 29. Specifications of concealment of property, see post, Sec. 825, et. seq. 9 In re Adams, 171 Fed. Rep. 599, 22 Am. B. R. 613.

tilate," <sup>10</sup> and includes continuous concealment as where the bankrupt placed property in concealment before bankruptcy and it remained concealed after bankruptcy. <sup>11</sup>

No one can be punished for this offense unless he is or has been a bankrupt. The officers of a bankrupt corporation are liable to punishment for this offense, if they participated in concealing assets of the corporation.<sup>12</sup>

An indictment for conspiracy to conceal assets of the bankrupt should charge some overt act after the bankruptcy, although the conspiracy may have originated before bankruptcy. <sup>13</sup> It may join as defendant a bankrupt corporation, <sup>14</sup> but need not include the bankrupt, <sup>15</sup> and can not include the trustee. <sup>16</sup>

<sup>10</sup> B. A. 1898, Sec. 1, clause 22.
 <sup>11</sup> In re Jacobs & Verstandig, 17
 Am. B. R. 470; In re James (C. C. A. 4th Cir.), 181 Fed. Rep. 476, 104
 C. C. A. 224, 24 Am. B. R. 288, 954, affirming 175 Fed. Rep. 894, 23 Am. B. R. 703.

To prove concealment the prosecution need not take up each moment of the life of the bankrupt to prove what he did, but omission from the schedule would be immaterial if the bankrupt had disclosed property to the trustee. Concealment means continuous concealment during the whole course of the proceedings. Johnson v. United States (C. C. A. 1st Cir.), 163 Fed. 30, 81 C. C. A. 416, 20 Am. B. R. 724. The offense of concealment existed though the conspiracy originated before the bankruptcy, as it included an intent to continue the concealment till after bankruptcy. Alkon v. United States (C. C. A. 1st Cir.), 163 Fed. 810, 90 C. C. A. 116, 22 Am. B. R. 489.

12 Cohen v. United States (C. C. A. 2d Cir.), 157 Fed. Rep. 653, 85
C. C. A. 113, 19 Am. B. R. 8;
United States v. Young & Holland
Co., 170 Fed. Rep. 110, 22 Am. B.
R. 484; United States v. Freed,

179 Fed. Rep. 236, 25 Am. B. R. 89. But see Field v. United States (C. C. A. 8th Cir.), 137 Fed. Rep. 6, 14 Am. B. R. 507; United States v. Lake, 129 Fed. Rep. 499, 12 Am. B. R. 270.

<sup>18</sup> United States v. Grodson, 164 Fed. Rep. 157, 21 Am. B. R. 68. Compare United States v. Cohn, 15 Am. B. R. 357; United States v. Young & Holland Co., 170 Fed. 110, 22 Am. B. R. 484.

14 United States v. Young & Holland Co., 170 Fed. 110, 22 Am. B.
 R. 484; United States v. Freed, 179 Fed. 236, 25 Am. B. R. 89.

15.Cohen v. United States (C. C. A. 2d Cir.), 157 Fed. 651, 85 C. C. A. 113, 19 Am. B. R. 8, under Revised Statutes, Sec. 5440. See United States v. Freed, 179 Fed. 236, 25 Am. B. R. 89, president of a corporation indicted for concealment of its assets, in which he participated.

Section 29b of the bank-ruptcy act requires as a principal offender a bankrupt although others may be also joined. United States v. Young & Holland Co., 170 Fed. Rep. 110, 22 Am. B. R. 484.

<sup>16</sup> The indictment may not charge a trustee in bankruptcy with partici-

The act of concealment must be done knowingly and fraudulently.<sup>18</sup>

The offense of concealment can not be imputed, so where the husband of an innocent bankrupt conceals property the bankrupt is not guilty of an offense.<sup>20</sup>

Although advice of counsel is not a defense in itself,<sup>21</sup> still it should be considered, and where an omission of property from the schedules is made in good faith, acting under the advice of counsel, it is not a concealment within the act <sup>22</sup>

pation in and knowledge of a transaction which could only be an offense against the law when it was concealed from him. Johnson v. United States (C. C. A. 5th Cir.), 158 Fed. 69, 85 C. C. A. 399.

18 United States v. Goldstein, 132
Fed. Rep. 789, 12 Am. B. R. 755;
United States v. Lowenstein, 126
Fed. Rep. 884, 11 Am. B. R. 134; In re Freund, 98 Fed. Rep. 81, 3 Am. B. R. 418; Smith v. Keegan, 111 Fed. Rep. 157, 7 Am. B. R. 4; In re Pierce, 103 Fed. Rep. 64, 4 Am. B. R. 554; In re Kaiser, 99 Fed. Rep. 689, 3 Am. B. R. 767; In re Blalock, 118
Fed. Rep. 679, 9 Am. B. R. 266; In re Beebe, 116 Fed. Rep. 48, 8 Am. B. R. 597.

McNeil v. United States (5th Cir.), 150 Fed. 82, 80 C. C. A. 36, 80 Am. B. R. 18; United States v. Comstock, 20 Am. B. R. 525; In re Herman Boasberg, 1 Am. B. R. 353, Referee. (The mere fact that the evidence may show a contemplation of insolvency is not sufficient.)

For charge to jury on indictment for concealing property from trustee, see United States v. Levinson, 13 Am. B. R. 29.

An intent in the bankrupt to take his property and keep it from his creditors is an intent to "defraud" them, although he thought himself justified in doing so. *In re* Nelson, 179 Fed. 320, 25 Am. B. R. 236.

<sup>20</sup> In re Meyers, 105 Fed. Rep. 353, 5 Am. B. R. 4; In re Hyman, 97 Fed. Rep. 195, 3 Am. B. R. 169.
 <sup>21</sup> McNeil v. United States (5th Cir.), 150 Fed. 82, 80 C. C. A. 36, 18 Am B. R. 18; See In re Schreck, 1 Am. B. R. 366, Referee.

<sup>22</sup> In re Alleman, 162 Fed. Rep. 693, 20 Am. B. R. 745 (where bankrupt's ownership is doubtful). See Kern v. United States (C. C. A 6th Cir.), 169 Fed. Rep. 617, 95 C. C. A. 145, 22 Am. B. R. 223.

Where insurance policies are pledged to the companies for loans, to their full surrender value, and the bankrupt's attorney advises him that it is not necessary to mention them in view of that fact, this is not a concealment, as the advice of counsel rebuts the charge of fraud in omitting them from the schedules. In re Kyte, 174 Fed. Rep. 867, 23 Am. B. R. 414. Where the bankrupt, after petition has been filed against him received two premiums on a tontine insurance policy, and where he consulted his attorney, who was also counsel for the creditors and the trustee, in regard to this, there is no fraudulent concealment of assets suffibut only in case of a full and frank disclosure to the counsel, and acting on his opinion as a matter of law.<sup>25</sup>

In the absence of any explanation the omission of property of value from the schedule after being advised that it should include all property, is sufficient to show a fraudulent concealment.<sup>26</sup> But where the title is concealed by a colorable conveyance to the wife of the bankrupt to prevent it passing into the possession of the trustee, it clearly comes within this provision, and is an offense under the act,<sup>27</sup> but not where the bankrupt turns over to his wife her own property.<sup>28</sup> It is not a concealment of property for a husband who has failed in business to transact business in the name of his wife as her agent.<sup>30</sup>

If the bankrupt actually transfers his property, although it is done fraudulently to keep it from his creditors, still, if he does not reserve any right to a reconveyance or any beneficial interest, that is, unless a secret trust in favor of himself is established, there is no concealment if the prop-

cient to bar his discharge, although he used the money for his own purposes. Klein v. Powell (C. C. A. 3d Cir.), 174 Fed. Rep. 640, 23 Am. B. R. 494.

<sup>25</sup> Remmers v. Merchants'-Laclede Nat. Bank (C. C. A. 8th Cir.),
173 Fed. Rep. 484, 97 C. C. A. 490,
23 Am. B. R. 78.

<sup>26</sup> Osborn v. Perkins (C. C. A.
1st Cir.), 112 Fed. Rep. 127, 7 Am.
B. R. 250; In re Breitling, 133
Fed. Rep. 146, 13 Am. B. R. 126.

<sup>27</sup> In re Steindler & Hahn, 5 Am. B. R. 63, Referee; In re Guilbert, 169 Fed. Rep. 149, 22 Am. B. R. 221, 24 Am. B. R. 789; In re McCann, 179 Fed. 575, although the conveyance was more than four months before the filing of the petition.

An allegation that a bankrupt

turned over a certain business to his wife under agreement that he might take from the business what sums he desired, and that he did take less than his services were worth does not set up the existence of an enforceable debt in favor of the wife, and therefore does not set up a false oath in concealment in omitting such debt from his schedules. *In re* Adams, 171 Fed. Rep. 599, 22 Am. B. R. 613. See *In re* Countryman, 119 Fed. Rep. 637, 9 Am. B. R. 572; *In re* Schreck, 1 Am. B. R. 366, Referee.

28 In re Joseph Dews, 2 Am. B.
 R. 483; In re Tillyer, 17 Am. B.
 R. 125, Referee.

30 In re Fitchard, 103 Fed. Rep.
 742, 4 Am. B. R. 609; In re Locks,
 104 Fed. Rep. 783, 5 Am. B. R. 136.

erty is omitted from his schedules,<sup>31</sup> but if the facts show that the bankrupt reserved any beneficial interest for himself, there is a concealment.<sup>32</sup> Where a preference has been given or a transfer made within four months prior to the filing of the petition, it is not in itself mala fides, and under the present act, the bankrupt is not guilty of the offense of concealment in not setting forth such property in his schedule.<sup>33</sup>

It is not an offense punishable under the act to omit to name property in the schedule by accident or mistake,<sup>34</sup> or which the bankrupt considered worthless,<sup>35</sup> or property which the debtor did not know that he owned,<sup>36</sup> or property which the bankrupt, in good faith, thought did not pass to the trustee,<sup>37</sup> or which did not pass to the trustee,<sup>38</sup> as acquired

31 In re Dauchy, 122 Fed. Rep. 688, 10 Am. B. R. 527, affirmed (C. C. A. 2d Cir.), 130 Fed. Rep. 532, 11 Am. B. R. 511; In re Jacobs, 144 Fed. Rep. 868, 16 Am. B. R. 482; In re McGurn, 102 Fed. Rep. 743, 4 Am. B. R. 459; In re Goodale, 109 Fed. Rep. 783, 6 Am. B. R. 493; In re Fitchard, 103 Fed. Rep. 742, 4 Am. B. R. 609; In re Cornell, 97 Fed. Rep. 29, 3 Am. B. R. 172; In re Crist, 116 Fed. Rep. 1007, 9 Am. B. R. 1; In re Howell, 105 Fed. Rep. 594, 5 Am. B. R. 414a. But see In re Skinner, 97 Fed. Rep. 190, 3 Am. B. R. 163.

32 În re Welch, 100 Fed. Rep. 65, 3 Am. B. R. 93; In re Bemis, 104 Fed. Rep. 672, 5 Am. B. R. 36; In re Becker, 106 Fed. Rep. 54, 5 Am. B. R. 438; Bragasa v. St. Louis Cycle, 107 Fed. Rep. 77, 5 Am. B. R. 700; In re Wilcox (C. C. A. 2d Cir.), 109 Fed. Rep. 628, 6 Am. B. R. 362; In re Gammon, 109 Fed. Rep. 312, 6 Am. B. R. 482; In re Quackenbush, 102 Fed. Rep. 282, 4 Am. B. R. 274; United States v. Levinson, 13 Am. B. R. 29, 32.

<sup>33</sup> In re Pierce, 103 Fed. Rep. 64,4 Am. B. R. 554.

<sup>34</sup> In re Wetmore, 99 Fed. Rep. 703, 3 Am. B. R. 700; In re Morrow, 97 Fed. Rep. 574, 3 Am. B. R. 263.

35 Munn v. Griffin, 180 Pa. St. 452, 36 A. 865. (Where for fourteen years thereafter the bankrupt thought it so worthless that he made no effort to regain it.)

<sup>36</sup> In re Parker, No. 10720 Fed. Cas., 4 Biss. 501.

<sup>37</sup> Rugely v. Robinson, 19 Ala. 1404; In re Adams, 104 Fed. Rep. 72, 4 Am. B. R. 696.

The product of his wife's lands, which although they appear as a matter of law part of his estate, are, however, claimed by his wife. In re Marsh, 109 Fed. 602, 6 Am. B. R. 537.

<sup>38</sup> A claim for alimony which has not gone to judgment is not property which passes to the trustee, and its omission from the schedule is therefore not an offense. *In re* LeClaire, 124 Fed. Rep. 654, 10 Am. B. R. 733.

after the adjudication, 40 or where the evidence does not show a legally consummated gift or transfer. 41 It has also been said that there can be no concealment under the act when the title to all the bankrupt's property passed to a receiver before bankruptcy proceedings. 42

The fact that a bankrupt's interest in land is doubtful and, if it exists, may be exempt, does not prevent its omission from the schedule being a concealment, but is evidence to be considered in determining whether or not there was fraudulent intent.<sup>44</sup> The failure to include in the schedule money in bank, after the bankrupt's attention has been called to it, amounts to a concealment although if it had been included the assets would not amount to the exemptions,<sup>45</sup> or be sufficient to pay the expenses of the proceedings.<sup>46</sup> A fraudulent conveyance is evidence of a fraudulent concealment.<sup>47</sup>

Circumstances to establish concealment depend more or less upon the circumstances of each particular case.<sup>48</sup> Con-

40 In re Parish, 122 Fed. Rep.
 553, 10 Am. B. R. 548; In re Charles Polakoff, 1 Am. B. R. 358.
 41 In re De Leeuw, 98 Fed. Rep.
 408, 3 Am. B. R. 418.

<sup>42</sup> In re Lesser (C. C. A. 2d Cir.), 114 Fed. Rep. 83, 8 Am. B. R. 15.

It is no defense to a false statement in the schedule in bankruptcy of a bankrupt's property that a receiver had been appointed by a state court to take charge of the property, and that all his assets had gone by operation of law into the hands of a receiver, and that to know what property passed to the receivers it was necessary to know what the proceedings in the state court would show in regard to the property surrendered to the receiver. Kern v. United States (C. C. A. 6th Cir.), 169 Fed. Rep.

617, 95 C. C. A. 145, 22 Am. B. R. 223.

<sup>44</sup> In re Todd, 112 Fed. Rep. 315, 7 Am. B. R. 770; In re Isaacson, 175 Fed. Rep. 292, 23 Am. B. R. 665.

45 In re Royal, 112 Fed. Rep. 135,7 Am. B. R. 106,

<sup>46</sup> In re Lowenstein, 106 Fed. Rep. 51, 2 Am. B. R. 193. See also In re Roy, 96 Fed. Rep. 400, 3 Am. B. R. 37.

<sup>47</sup> Ashley v. Robinson, 29 Ala. 112, 65 Am. Dec. 387.

48 In the following cases the bankrupt was held to have concealed property: In re Otto, 115 Fed. Rep. 860, 8 Am. B. R. 305, 753; In re Kenyon, 112 Fed. Rep. 658, 7 Am. B. R. 527; In re Bullwinkle, 111 Fed. Rep. 364, 6 Am.

cealment may be found on evidence that the bankrupts were involved in a burglary of their own store just before the bankruptcy; 49 that his memory is less than that of an intelligent man; 50 that his schedule is indefinite; 51 that he failed to advise the trustee of a claim against the bankrupt's wife for expending money on her property.<sup>52</sup> So also is the failure to schedule an interest in remainder under a will and the knowingly sending to a false address the notice to a creditor,53 and the selling of goods at wholesale as soon as purchased and

B. R. 756; In re Grossman, 111 Fed. Rep. 507, 6 Am. B. R. 510; In re Hoffman, 102 Fed. Rep. 979, 4 Am. B. R. 331; In re Quackenbush, 102 Fed. Rep. 282, 4 Am. B. R. 274; In re Bragasa, 103 Fed. Rep. 936, 4 Am. B. R. 519; In re Heyman, 104 Fed. Rep. 677, 4 Am. B. R. 735; In re Wood, 98 Fed. Rep. 972, 3 Am. B. R. 572; In re Semmel, 118 Fed. Rep. 487, 9 Am. B. R. 351.

In the following cases the bankrupt was held not to have concealed his property: Fields v. Karter (C. C. A. 5th Cir.), 115 Fed. Rep. 950, 8 Am. B. R. 351; In re Miner, 114 Fed. Rep. 998, 8 Am. B. R. 248; In re Howden, 111 Fed. Rep. 723. 7 Am. B. R. 191; In re Bryant, 104 Fed. Rep. 789, 5 Am. B. R. 114; In re Conn, 108 Fed. Rep. 525, 6 Am. B. R. 217; In re Hansen, 107 Fed. Rep. 252, 5 Am. B. R. 747; In re Slingluff, 105 Fed. Rep. 502, 5 Am. B. R. 76; In re Adams, 104 Fed. Rep. 72, 4 Am. B. R. 696; In re Locks, 104 Fed. Rep. 783, 5 Am. B. R. 136; Fellows v. Freudenthal, 102 Fed. Rep. 731, 4 Am. B. R. 490; In re Freund, 98 Fed. Rep. 81, 3 Am. B. R. 418; In re Le Claire, 124 Fed. Rep. 654, 10 Am. B. R. 733.

49 In re Barton Bros., 149 Fed. 620, 18 Am. B. R. 98.

50 In re Frank E. Cabius, 6 Am. B. R. 156, Referee (affirmed by Brown, J.).

51 Where the schedule is indefinite it would point to no more assets than in aid of it the bankrupt should actually discover to the trustee or at least only so much as the trustee would be likely to discover. And if he had formed the purpose to conceal the other assets from the trustee his verification of the schedule was a falsehood. The very purpose of it was to show what his assets were and the whole of them. It is a question for the jury whether he meant to swear that all his assets were those in sight. Kern v. United States (C. C. A. 6th Cir.), 169 Fed. Rep. 617, 95 C. C. A. 145, 22 Am. B. R. 223. 52 In re Winchester, 155 Fed. Rep. 505, 19 Am. B. R. 227.

53 In re Roosa, 119 Fed. Rep. 542, 9 Am. B. R. 531; In re Gailey (C. C. A. 7th Cir.), 127 Fed. Rep. 538, 11 Am. B. R. 539; In re Breiner, 129 Fed. Rep. 155, 11 Am. B. R. 684.

See also Woods v. Little (C. C. A. 3d Cir.), 134 Fed. Rep. 229, 13 Am. B. R. 742,

paying the proceeds to a friend,<sup>54</sup> or making large and unusual purchases for which no accounting was made,<sup>55</sup> and the payment of debts due to relatives when such debts were not kept in books of account,<sup>56</sup>

Where a bankrupt fails to account for property not scheduled, but which was in his possession shortly before adjudication, the presumption is that the proceeds of it are in his possession.<sup>57</sup>

No concealment was found where the bankrupt enters the sale in question on his books,<sup>58</sup> where he has delivered the property to the trustee and his son,<sup>59</sup> or has wasted money in dissipation after turning over to an assignee a sum he believed sufficient to pay his debts,<sup>60</sup> or where he makes a voluntary surrender of property in which he kept no interest,<sup>61</sup> or where the president of a corporation omitted its property from his personal schedules,<sup>62</sup> or where the bankrupt omits a mass of obsolete and worthless claims and demands on which no action could be maintained,<sup>63</sup> or claims in the hands of attorneys on contingent fees.<sup>64</sup>

\*Speaking of a charge of concealing property to defeat a discharge, Judge Blatchford said:  $^{65}$ 

"A fraud of the kind here alleged is one that can seldom be proved by other than circumstantial evidence. The parties to the transaction are generally, as in this case, the only

54 In re Holstein, 114 Fed. Rep.794, 8 Am. B. R. 147.

55 In re Averick, 170 Fed. Rep.521, 22 Am. B. R. 518.

<sup>56</sup> In re Greenberg, 114 Fed. Rep.773, 8 Am. B. R. 94.

<sup>57</sup> Seigel v. Cartel (C. C. A. 8th Cir.), 164 Fed. 691, 21 Am. B. R. 140; *In re* Stavrahn (C. C. A. 2d Cir.), 174 Fed. Rep. 330, 23 Am. B. R. 168.

<sup>58</sup> In re Kyte, 174 Fed. Rep. 867, 23 Am. B. R. 414, even though the. trustee can not trace the money.

<sup>59</sup> In re Kyte, 174 Fed. Rep. 867,23 Am. B. R. 414.

60 In re Boner, 169 Fed. Rep. 727,22 Am. B. R. 151.

<sup>61</sup> In re Kolster, 17 Am. B. R. 52.
 <sup>62</sup> Vehon v. Ullman (C. C. A. 7th Cir.), 147 Fed. Rep. 694, 78 C. C. A. 82, 17 Am. B. R. 435.

63 In re Pearce, 21 Vt. 611.

<sup>64</sup> In re George H. McAdam, 3 Am. B. R. 417.

65 In re Goodridge, No. 5547 Fed. Cas., 2 N. B. R. 324.

witnesses, and if their stories are to be believed as told, no fraud can be established. External evidence is not to be had, and the truth must be reached by examining the evidence of the alleged parties to the fraud, and weighing its probabilities, and scrutinizing its general tenor and manner. The determination of the question of fraud or no fraud must, under such circumstances, depend upon the impression made by the evidence of the parties concerned. Of course those who would commit such a fraud would swear falsely to carry it through. If their positive testimony to the honesty of the transaction is overborne by badges and indicia of fraud, deduced from their own testimony, the conclusion must be that there was fraud. If their positive testimony to the honesty of the transaction is true, and there was no fraud, there will not be found in their testimony any badges and indicia of fraud sufficient to overbear such positive testimony." The charge of concealment ought to be substantiated either by direct testimony or by such facts as afford unequivocal circumstantial evidence of it. It certainly ought not to be taken to be true upon any slight or ambiguous presumptions, nor upon any state of facts which do not clearly, and, indeed, almost necessarily, call for such an inference.66 It should be borne in mind that the degree of proof here spoken of is not that necessary to convict the bankrupt, but that necessary to sustain specifications in opposition to discharge. To convict, the proof must be beyond a reasonable doubt.67

66 In re Lafleche, 109 Fed. Rep. 307, 6 Am. B. R. 483; In re Greenberg, 114 Fed. Rep. 773, 8 Am. B. R. 94; In re Howden, 111 Fed. Rep. 723, 7 Am. B. R. 191; In re Ferris, 105 Fed. Rep. 356; 5 Am. B. R. 246; In re Gaylord, 106 Fed. Rep. 833, 5 Am. B. R. 410; In re Corn, 106 Fed. Rep. 143, 5 Am. B. R. 478; In re Fitchard, 103 Fed. Rep. 742, 4 Am. B. R. 609; In re Steed, 107 Fed. Rep. 682, 6 Am.

B. R. 73; In re Leslie, 119 Fed.
Rep. 406, 9 Am. B. R. 561; In re
Blalock, 118 Fed. Rep. 679, 9 Am.
B. R. 266.

<sup>67</sup> In re Charles Polakoff, 1 Am. B. R. 358.

In an indictment for concealing assets the bankrupt has no right to show that up to the time of his failure he was paying all his creditors in the usual way, as this is too remote. Johnson v. An unexplained shrinkage of assets is evidence of concealment,<sup>70</sup> and is held to raise a presumption and to throw the burden strongly on the bankrupt.<sup>74</sup> If accompanied by a failure to keep account books, there is sufficient proof of concealment,<sup>75</sup> but a decision based merely on the fact that there was an unexplained shrinkage is incorrect, when the only evidence to show that there ever were such assets is a statement to a mercantile agency.<sup>77</sup>

United States (C. C. A. 1st Cir.), 170 Fed. Rep. 581, 22 Am. B. R. 359, 95 C. C. A. 661. Where there is nothing to show that a bankrupt, in giving evasive and disrespectful answers to questions concerning his property wilfully concealed testimony, preventing his creditors from obtaining the property, his conduct is not ground for refusing to grant him a discharge. In re Fanning, 155 Fed. Rep. 701, 19 Am. B. R. 55.

70 In re Leslie, 119 Fed. Rep. 406, 9 Am. B. R. 561; In re Breitling, 133 Fed. Rep. 146, 13 Am. B. R. 126; Seigel v. Cartel (C. C. A. 8th Cir.), 164 Fed. Rep. 691, 90 C. C. A. 512, 21 Am. B. R. 140; In re Simon & Sternberg, 151 Fed. Rep. 507, 18 Am. B. R. 204; In re Robert Greenberg & Bro., 179 Fed. Rep. 413, 24 Am, B, R, 943. The purchase of goods on credit and their subsequent disappearance within a short time before bankruptcy while the bankrupt knew he was insolvent, together with an utter failure to explain the matter supplies a fair preponderance of evidence. In re Cramer, 175 Fed. Rep. 879, 23 Am. B. R. 637. Evidence held to show concealment where the items in the account books showing what had become of the merchandise and cash could not be satisfactorily explained. In re Margolis, 181 Fed. Rep. 591, 24 Am. B. R. 934. A debtor was held guilty of concealing his assets from his creditors, where a statement filed eleven months before the bankruptcy showed assets of \$5,750 and indebtedness of \$1,700, but his scheduler showed assets of \$2,000, and indebtedness of \$2,616.27, and where he made no satisfactory explanation of the great change in his financial condition. In re Dobbs, 172 Fed. Rep. 682, 22 Am. B. R. 801.

74 In re Cashman, 103 Fed. Rep. 67, 4 Am. B. R. 326, In re Finklestein, 101 Fed. Rep. 418, 3 Am. B. R. 800; In re Morgan, 101 Fed. Rep. 982, 4 Am. B. R. 402.

<sup>75</sup> In re Mendelsohn, 102 Fed. Rep. 119, 4 Am. B. R. 103; In re Ablowich, 99 Fed. Rep. 81, 3 Am. B. R. 586; In re O'Gara, 97 Fed. Rep. 932, 3 Am. B. R. 349.

The court had a right to call the attention of the jury to the consideration that the bankrupt kept no books of account, where concealment of assets was charged, although the bankrupt claimed that the transactions were strictly cash, were kept on slips and were destroyed as each transaction closed.

<sup>77</sup> In re Lesser (C. C. A. 2d Cir.), 114 Fed. Rep. 83, 8 Am. B. R. 15.

The fact that the bankrupt later amended a false schedule of his assets and to some extent aided the trustee to discover them while it may influence the court as to the punishment to be inflicted, is no defense either to the crime of false swearing or concealment of assets.<sup>78</sup>

The penalty for this offense is imprisonment for a period not to exceed two years.<sup>79</sup>

#### § 652. False oath or account.

It is an offense to knowingly and fraudulently make a false oath or account in, or in relation to, any proceeding in bankruptcy.<sup>80</sup> An oath includes an affirmation.<sup>81</sup>

An offense under this provision may arise in connection with any oath or affirmation made in any part of the proceedings, as an oath to a schedule filed by a bankrupt, an oath to prove the debt of a creditor, an oath made to an account by a trustee, or a deposition or testimony given by any person in the course of the proceedings.<sup>82</sup> The essential elements are that it be made knowingly and fraudulently,<sup>83</sup>

<sup>78</sup> Kern v. United States (C. C. A. 6th Cir.), 169 Fed. Rep. 617, 95 C. C. A. 145, 22 Am. B. R. 223; *In re* Eaton, 110 Fed. Rep 731, 6 Am. B. R. 531.

<sup>79</sup> B. A. 1898, Sec. 29b.

<sup>80</sup> B. A. 1898, 28b, clause 2; specifications of false oath, see post, Sec. 769.

81 B. A. 1898, Sec. 1, clause 17.

82 In re Conroy, 134 Fed. Rep.
764, 14 Am. B. R. 249; U. S. v.
Wechsler, 16 Am. B. R. 1; Edelstein v. United States (C. C. A. 8th
Cir.), 149 Fed. Rep. 636, 79 C. C. A.
328, 17 Am. B. R. 649, false swearing by a bankrupt upon the hearing of specifications of objections to his discharge. See In re Salisbury, 113
Fed. Rep. 833, 7 Am. B. R. 771. See

In re Luftig, 162 Fed. 322, 15 Am. B. R. 773.

83 Kentucky Nat. Bank v. Carley (C. C. A. 3d Cir.), 127 Fed. Rep. 686, 12 Am. B. R. 119; United States v. Simon, 146 Fed. Rep., 89; In re Freund, 98 Fed. Rep. 81, 3 Am. B. R. 418; Smith v. Keegan, 111 Fed. Rep. 157, 7 Am. B. R. 4; In re Pierce, 103 Fed. Rep. 64, 4 Am. B. R. 554; In re Kaiser, 99 Fed. Rep. 689, 3 Am. B. R. 767; In re Blalock, 118 Fed. Rep. 679, 9 Am. B. R. 266; In re Beebe, 116 Fed. Rep. 48, 8 Am. B. R. 597; In re De Leeuw, 98 Fed. Rep. 408, 3 Am. B. R. 418, (The oath must be knowingly false to create an offense which would bar a discharge.)

that it be false, and that it be in, or in relation to, a proceeding in bankruptcy.<sup>84</sup> It must be made by the bankrupt and not by his partner.<sup>85</sup>

It is not an offense punishable under the act to unintentionally make a false statement under oath, and it would seem that Section 7, sub. 9, protects the bankrupt if he intentionally makes a false oath on his examination. The mere understatement or overstatement in a schedule, of the amount of debts, does not warrant the conclusion that the bankrupt was misrepresenting the condition of his estate; 87 nor is proof that the bankrupt made statements contrary to his oath, proof that the oath was false. 88

There is no guilt in omitting from the schedule securities which are worthless,<sup>89</sup> but an omission of equities in real estate, though of small value is a false oath.<sup>90</sup>

Where the offense of concealment is committed by omitting assets from the schedule there must necessarily be a false oath, as the schedule must be verified by the bankrupt.<sup>91</sup>

The fact that the bankrupt files amended schedules including property left out of the first schedule is evidence that the false oath to the first was not knowingly made, but

84 In re Blalock, 118 Fed. Rep.
679, 9 Am. B. R. 266; Bauman v. Feist (C, C. A. 8th Cir.), 107 Fed.
Rep. 83, 5 Am. B. R. 703.

95 Hardie v. Swafford Bros. Dry Goods Co. (C. C. A. 5th Cir.), 165
 Fed. Rep. 588, 91 C. C. A. 426, 21
 Am. B. R. 457.

86 United States v. Simon, 146 Fed. Rep. 89, 17 Am. B. R. 41; In re Gaylord (C. C. A. 2d Cir.), 112 Fed. Rep. 668, 7 Am. B. R. 1; In re Dow's Estate, 105 Fed. Rep. 889, 5 Am. B. R. 400; In re Goodale, 109 Fed. Rep. 783, 6 Am. B. R. 493; In re Marx, 102 Fed. Rep. 676, 4 Am. B. R. 521. See also Burrell v. Mon-

tana, 194 U. S. 572, 48 L. Ed. 1122, 12 Am. B. R. 132.

87 In re Miner, 114 Fed. Rep. 988,
8 Am. B. R. 248.

88 Bauman v. Feist (C. C. A. 8th Cir.), 107 Fed. Rep. 83, 5 Am. B. R. 703.

89 In re McCrea (C. C. A. 2d Cir.), 161 Fed. 246, 88 C. C. A. 282, 20 Am. B. R. 412.

<sup>90</sup> In re Guilbert, 169 Fed. Rep. 149, 22 Am. B. R. 221.

91 In re Stoddart, 114 Fed. Rep.
486, 7 Am. B. R. 762; In re Boyden, 132 Fed. Rep. 991, 13 Am. B.
R. 269; In re George W. Schreck,
1 Am. B. R. 366 (referee)

is not conclusive, and if the first was knowingly made, the amended schedule would not work a cure. 92

Where a creditor has proved his claim in contract and makes no claim of fraud it is immaterial on the examination of the bankrupt what representations the bankrupt made to induce the incurring of the obligation. Therefore a false statement as to these representations made in his examination is not a false oath in relation to a proceeding in bankruptcy within the statute.<sup>93</sup>

An indictment charging perjury for omitting assets from schedules is defective unless it charges directly that there was other property. An indictment charging perjury under R. S. Section 5292 is bad on demurrer unless it charges that the defendant took the oath alleged to be false "willfully." 95

So also a person who is required to make an account is guilty of an offense punishable under the act who knowingly and fraudulently makes a false one, not necessarily under oath. This includes the schedule of a bankrupt, the reports of the trustee, receiver and other officers of the court, and any person or persons required by the court to furnish an account of property or funds. An honest mistake or an omission is not sufficient evidence of guilt. It must have been intentional, and for the purpose of deceiving, to render the person making it guilty of an offense.

A charge of perjury may be predicated upon false testimony given by the bankrupt upon the examination under Section 21a before a special commissioner. It is necessary to show that the oath was administered to the defendant by a person properly appointed and authorized to do so, but it is

<sup>92</sup> In re Eaton, 110 Fed. Rep. 731,
6 Am. B. R. 531; Kern v. United
States (C. C. A. 6th Cir.), 169
Fed. Rep. 617, 95 C. C. A. 145, 22
Am. B. R. 223.

<sup>98</sup> In re Chamberlain, 180 Fed.Rep. 304, 25 Am. B. R. 37.

<sup>94</sup> Bartlett v. United States (C.

C. A. 9th Cir.), 106 Fed. Rep. 884, 46 C. C. A. 19, 5 Am. B. R. 678.

<sup>95</sup> United States v. Lake, 129 Fed.Rep. 499, 12 Am. B. R. 270.

of United States v. Wechsler, 16 Am. B. R. 1; U. S. v. Simon, 146 Fed. Rep. 89, 17 Am. B. R. 41.

sufficient to support the charge of perjury if the defendant take the oath either before he began to testify or when he got through and signed his name to the testimony.<sup>97</sup>

The penalty for this offense is imprisonment for a period not exceeding two years. 98

Where the question of the oath comes up in opposition to the discharge the creditor must establish his case by a preponderance of the evidence.<sup>99</sup>

# § 653. Presenting false claims.

It is an offense punishable under the bankrupt statute knowingly and fraudulently to present under oath any false claim for proof against the estate of a bankrupt, or use any such claim in composition personally or by agent, proxy, or attorney, or as agent, proxy, or attorney.<sup>100</sup>

The essential elements of this offense are: First, the presenting of a false claim under oath for proof against the estate of the bankrupt or to use any such claim in composition; and, secondly, to do so knowingly and fraudulently. If either of these elements is wanting, it is not a punishable offense. The offense may be committed not only by the person who owns the claims, or who is to be benefited by proving it, but may be committed by any agent, proxy, or attorney who actually presents the false claim, knowing it to be false and with intent to practice a fraud upon the real creditors.

The penalty for this offense is imprisonment for a period not to exceed two years.<sup>1</sup>

## § 654. Receiving property from a bankrupt.

It is a punishable offense to knowingly and fraudulently receive any material amount of property from a bankrupt after the filing of the petition, with intent to defeat the act.<sup>2</sup>

<sup>&</sup>lt;sup>97</sup> United States v. Wechsler, 16 Am. B. R. 1.

<sup>98</sup> B. A. 1898, Sec. 29b.

 <sup>99</sup> Troeder v. Lorsch (C. C. A.
 1st Cir.), 150 Fed. Rep. 710, 17
 Am. B. R. 723.

<sup>&</sup>lt;sup>100</sup> B. A. 1898, Sec. 29b, clause 3.

<sup>&</sup>lt;sup>1</sup> B. A. 1898, Sec. 29b.

<sup>&</sup>lt;sup>2</sup> B. A. 1898, Sec. 29b, clause 4. In Knapp & Spencer Co. v. Drew, (C. C. A. 8th Cir.), 160 Fed. Rep. 413, 416, 87 C. C. A. 365, 20 Am. B.

The gist of the offense created by this clause is to receive property from a bankrupt after bankruptcy proceedings have been commenced, with intent to keep property from the trustee. The bankrupt who so transfers property is guilty of the offense of concealing property under the first clause of Section 29. This clause makes the person receiving such property also guilty of an offense punishable under the act.

The offense can not be committed unless a petition has been filed in a court of competent jurisdiction in which a trustee can be appointed.<sup>3</sup> It is also essential that the person receiving the property does so knowingly and fraudulently with intent to defeat the act.<sup>4</sup>

The penalty for this offense is imprisonment for a period not to exceed two years.<sup>5</sup>

### § 655. Extorting money for forbearing to act.

It is a punishable offense under the bankrupt act to knowingly and fraudulently extort or attempt to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings.<sup>6</sup> Under the former act it was held that acting or forbearing to act in bankruptcy proceedings was not such a consideration as would support a note.<sup>7</sup> But the present statute goes further; it makes it an offense punishable by imprisonment for a period not to exceed two years.<sup>8</sup>

R. 355, Judge Adams uses this language: "The appellant in taking the money from the bankrupt after proceedings in bankruptcy had been instituted against him violated the spirit and purpose of the bankruptcy act by attempting to prevent the administration of the estate by the proper court after it had taken jurisdiction over it and had already taken the money in question into actual possession through its receiver. Not only so, but the officers of appellant in doing what they did,

if the same was knowingly and fraudulently done, committed an offense denounced by section 29b, subd. 4, Bankruptcy 'Act."

<sup>8</sup> See United States v. Latorre, No. 15567 Fed. Cas., 8 Blatch. 134.

<sup>4</sup> In re Luftig, 15 Am. B. R. 773.

<sup>6</sup> В. А. 1898, Sec. 29b.

<sup>6</sup> B. A. 1898, Sec. 29b, clause 5.

<sup>7</sup> Rice v. Maxwell, 13 Smeads & M. (21 Miss.) 289; Bell v. Leggett, 3 Selden (7 N. Y.) 178.

<sup>8</sup> B. A. 1898, Sec. 29b.

# § 656. Agreement to stifle prosecution.

The bankruptcy court' will not sanction an agreement to stifle prosecution for a crime, 10 though it may increase the assets of the estate. 11

# § 657. Offenses by referees.

The bankrupt statute specifies three offenses which may be committed by a referee. They are, if he knowingly, first, acts as a referee in a case in which he is directly or indirectly interested; or, second, purchases, while a referee, directly or indirectly, any property of the estate in bankruptcy of which he is referee; or, third, refuses, while a referee or trustee, to permit a reasonable opportunity for the inspection of the accounts relating to the affairs of, and the papers and records of, estates in his charge by parties in interest when directed by the court so to do. 12

It is not an offense to refuse to permit an inspection of books, etc., unless such an inspection has been ordered by the court. If an inspection is denied by the referee or trustee, it is assumed that the refusal is based upon some good ground. If it is not, upon application to the court, an inspection will be allowed. A refusal by the referee or trustee after the order of court is an offense.

The penalty in case of any of the offenses mentioned in this section is a fine not to exceed five hundred dollars and a forfeiture of the office of referee. So also the right to submit an alleged offense under the act to a jury is determined and enjoyed according to the United States laws now in force, or such as may be hereafter enacted, in relation to trials by jury.<sup>13</sup> The office becomes vacant immediately upon conviction.

10 Mulford v. Fourth National Bank (C. C. A. 3d Cir.), 157 Fed. 897, 85 C. C. A. 225, 19 Am. B. R. 742, compromise with relatives of bankrupt charged with preferences on condition that no criminal prosecution against bankrupt be under-

taken is disapproved. See *In re* Luftig, 162 Fed. 322, 15 Am. B. R. 773.

<sup>11</sup> In re Rosenblatt, 153 Fed. 355, 18 Am. B. R. 663.

<sup>12</sup> B. A. 1898, Sec. 29c.

<sup>13</sup> B. A. 1888, Sec. 19c.

## § 658. What court has jurisdiction of criminal proceedings.

Proceedings to punish for offenses under the bankrupt act may be instituted by a court of bankruptcy.

In the general grant of powers conferred by section 2 of the act, upon the courts of bankruptcy, it is provided that they "are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers, and during their respective terms, as they are now or may be hereafter held, to . . . fourth, arraign, try, and punish bankrupts, officers and other persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies, of corporations, for violations of this act, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States."

Section 23c provides that "the United States circuit courts shall have concurrent jurisdiction with the courts of bank-ruptcy, within their respective territorial limits, of the offenses enumerated in this act." The Judicial Code of 1911 abolished the circuit courts, and transferred the jurisdiction to the several district courts.

The court for the district within which the offense is committed has jurisdiction to punish for the offense.

## § 659. Persons subject to punishment.

The act specifically designates the persons liable to the punishment which it prescribes.<sup>1</sup>

The statute only mentions bankrupts. It has been held that no person other than the bankrupt can be punished under this section.<sup>2</sup> The better rule is that section 29 applies not only

<sup>&</sup>lt;sup>1</sup> Secs. 289 to 292 of the act of A. 8th Cir.), 137 Fed. Rep. 6, 69 March 3, 1911, 36 Stat. at L. 1087.

<sup>1</sup> B. A. 1898, Sec. 29b.

C. C. A. 568, 14 Am. B. R. 507;

United States v. Lake, 129 Fed. Rep.

C. C. A. 568, 14 Am. B. R. 507;

C. C. A. 568, 14 Am. B. R. 507;

C. C. A. 568, 14 Am. B. R. 507;

<sup>&</sup>lt;sup>2</sup> Field v. United States (C. C. 499, 12 Am. B. R. 270.

to a bankrupt, but also to all persons who united with the bankrupt as participants in the act which is made an offense by the statute.<sup>3</sup> Other provisions of the bankrupt act support this view.<sup>4</sup>

A bankrupt corporation may commit an offense under the bankrupt act, and its officers may be punished as participants in the forbidden acts.<sup>5</sup> Officers may be indicted without joining the corporation.<sup>6</sup>

A person may be liable to punishment for an act committed prior to an adjudication, if the adjudication is subsequently made.

<sup>8</sup> Cohen v. United States (C. C. A. 2d Cir.), 157 Fed. Rep. 653, 85 C. C. A. 113, 19 Am. B. R. 8; United States v. Young & Holland Co., 170 Fed. Rep. 110, 22 Am. B. R. 484; Alkon v. United States (C. C. A. 1st Cir.), 163 Fed. Rep. 810, 90 C. C. A. 116, 22 Am. B. R. 489.

See also United States v. Bayer, No. 14547 Fed. Cas., 4 Dill. 407; United States v. Stevens, 44 Fed. Rep. 132; United States v. Snyder, 8 Fed. Rep. 805, 14 Fed. Rep. 554; United States v. Houghton, 14 Fed. Rep. 544.

4 In defining the jurisdiction of the courts of bankruptcy, it is provided that they may, under Sec. 2, clause 4, "arraign, try and punish bankrupts, officers, and other persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies, of corporations for violations of this act, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States," and Chap. 1, Sec. 1, clause 19, reads: "'Persons' shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations."

<sup>5</sup> Cohen v. United States (C. C. A. 2d Cir.), 157 Fed. Rep. 653, 85 C. C. A. 113, 19 Am. B. R. 8; United States v. Young & Holland Co., 170 Fed. Rep. 110, 22 Am. B. R. 484; United States v. Freed, 179 Fed. Rep. 236, 25 Am. B. R. 89.

As to when corporations can commit crimes which consist in purposely doing things prohibited by statute and be charged with knowledge of the acts of their officers and agents, see New York Central R. R. Co. v. United States, 212 U. S. 481, 53 L. Ed. —.

<sup>6</sup> United States v. Young & Holland Co., 170 Fed. Rep. 110, 22 Am. B. R. 484.

<sup>7</sup> Alkon v. U. S. (C. C. A. 1st Cir.), 163 Fed. Rep. 810, 90 C. C. A. 116, 22 Am. B. R. 489; U. S. v. Young & Holland Co., 170 Fed. Rep. 110, 22 Am. B. R. 484; Kerrch v.

Persons may be punished for crimes, as perjury, conspiracy, etc., prohibited by the general statutes of the United States.<sup>8</sup> A crime punishable under the general statutes of the United States is not an offense arising under the bankrupt law, though the overt act necessary to be alleged may have been committed in a bankruptcy proceeding.<sup>9</sup>

The indictment must be found or information filed within one year from the commission of the offense, if proceedings are taken under the bankruptcy act, 10 but this limitation does not apply to an indictment under the Revised Statutes. 11

#### § 660. Indictment or information.

Proceedings to punish a person for an offense under the bankrupt act are criminal in their nature.

In such trials and proceedings the bankrupt act expressly adopts "the laws of procedure of the United States now in force, or such as may be hereafter enacted regulating trials for the alleged violation of laws of the United States." <sup>1</sup>

Criminal proceedings in bankruptcy are regularly instituted by an indictment found by a grand jury. But it has been held that where the crime is not infamous, within the meaning of that term as used in the fifth amendment to the constitution, the person committing it may be prosecuted by information.<sup>2</sup> All offenses under the present bankrupt act, except those punishable by fine only, are infamous within the

United States (C. C. A. 1st Cir.), 171 Fed. Rep. 366, 96 C. C. A. 258, 22 Am. B. R. 544; U. S. v. Cohn, 142 Fed. Rep. 983, 15 Am. B. R. 357. In Gilbertson v. U. S. (C. C. A. 7th Cir.), 168 Fed. Rep. 672, 94 C. C. A. 158, 22 Am. B. R. 32, the court said: "Without adjudication as a bankrupt within the meaning of the statute, the conviction can not be upheld, notwithstanding the proof of flagrant concealment of property from the trustee (de facto)."

<sup>8</sup> United States v. Comstock, 162 Fed. Rep. 416, 20 Am. B. R. 526; United States v. Lake, 129 Fed. Rep. 499, 12 Am. B. R. 270; Wechsler v. United States (C. C. A. 2d Cir.), 158 Fed. Rep. 579, 86 C. C. A. 37, 19 Am. B. R. 1.

<sup>9</sup> Consult United States v. Hirsch, 100 U. S. 33, 25 L. Ed. 539.

<sup>10</sup> B. A. 1898, Sec. 29d.

<sup>11</sup> United States v. Comstock, 162 Fed. Rep. 416, 20 Am. B. R. 526.

<sup>1</sup> B. A. 1898, Sec. 2, clause 4. <sup>2</sup> United States v. Block, No.

14609 Fed. Cas., 4 Saw. 211.

meaning of that term given by the supreme court.<sup>3</sup> It has been said that "the question is whether the crime is one for which the statutes authorize the courts to award an infamous punishment, not whether the punishment ultimately awarded is an infamous one. When the accused is in danger of being subjected to an infamous punishment if convicted, he has the right to insist that he shall not be put upon his trial except on the accusation of a grand jury." <sup>4</sup>

#### § 661. Averments in indictments.

General averments in an indictment are not sufficient. It must show an offense, and must convey to the accused the information necessary to enable him to make his defense.<sup>1</sup> A recital of evidential facts is improper.<sup>2</sup>

The indictment should aver that proceedings in bankruptcy were duly begun, naming the court and district in which they were had, and that an adjudication in bankruptcy had been made and when made.<sup>3</sup> It is not necessary to plead facts giving the bankruptcy court jurisdiction, as by showing that a corporation is within the classes subject to adjudication, or giving

\*See the discussion of this subject by Mr. Justice Gray, in Exparte Wilson, 114 U. S. 424, 29 L. Ed. 89, et seq. See also Medley, Petitioner, 134 U. S. 160, 33 L. Ed. 835; Mackin v. United States, 117 U. S. 348, 29 L. Ed. 909; Parkinson v. United States, 121 U. S. 281, 30 L. Ed. 959; United States v. De Walt, 128 U. S. 393, 32 L. Ed. 485.

\*In Exparte Wilson, 114 U. S.

426, 29 L. Ed. 89.

<sup>1</sup> Bartlett v. United States (C. C. A. 9th Cir.), 106 Fed. Rep. 884, 46 C. C. A. 19, 5 Am. B. R. 678; United States v. Lake, 129 Fed. Rep. 499, 12 Am. B. R. 270; McNeil v. United States (C. C. A. 5th Cir.), 150 Fed. Rep. 82, 80 C. C. A. 36, 18 Am. B. R. 22; United States v. Grodson, 164 Fed. Rep. 157, 21 Am.

B. R. 68; United States v. Comstock, 161 Fed. Rep. 644, 20 Am.B. R. 520.

Consult also Reg. v. Lands, 33 Eng. Law and Eq. 536; Rex v. Jones, 24 E. C. L. 156; Reg. v. Ewington, 41 E. C. L. 178; Reg. v. Boyd, 5 Cox Cr. Cas. 502.

<sup>2</sup> United States v. Freed, 179 Fed. 236, 25 Am. B. R. 89.

<sup>8</sup> In Gilbertson v. United States (C. C. A. 7th Cir.), 168 Fed. Rep. 672, 94 C. C. A. 158, 22 Am. B. R. 32, Judge Seaman said: "Without adjudication as a bankrupt within the meaning of the statute, the conviction can not be upheld notwithstanding the proof of flagrant concealment of property from the trustee (de facto)."

the names of the petitioning creditors, or the amount of debts, or the acts of bankruptcy. An adjudication in bankruptcy can not be collaterally attacked in a criminal proceeding.<sup>4</sup>

An allegation that a referee or a trustee was duly appointed in bankruptcy by the district court of the United States, naming the district, is sufficient.<sup>5</sup> It has been held sufficient to allege that a trustee was in contemplation.<sup>6</sup>

An indictment, charging an offense under section 29, should use the statutory words "knowingly and fraudulently" to characterize the offense, or an equivalent expression.<sup>7</sup> The word "feloniously" should not be used because the offenses are only misdemeanors.

# § 662. Averments in an indictment for concealing assets.

An indictment for concealment of assets must use the statutory words "knowingly and fraudulently," or their equivalents, to characterize the offense.<sup>1</sup>

A charge that the accused did unlawfully, knowingly, wilfully and fraudulently conceal from his trustee, etc., certain property belonging to the estate in bankruptcy, and which said property was in his hands and possession, etc., carries with it a sufficient averment that the accused knew that the property he was so charged with concealing belonged to his estate in bankruptcy.<sup>2</sup>

<sup>4</sup> Edelstein v. United States (C. C. A. 8th Cir.), 149 Fed. Rep. 636, 79 C. C. A. 328, 17 Am. B. R. 649; Gilbertson v. United States (C. C. A. 7th Cir.), 168 Fed. Rep. 672, 94 C. C. A. 158, 22 Am. B. R. 32; United States v. Freed, 179 Fed. Rep. 236, 25 Am. B. R. 89.

<sup>6</sup> Kerrch v. United States (C. C. A. 1st Cir.), 171 Fed. Rep. 366, 96
 C. C. A. 258, 22 Am. B. R. 544.

<sup>6</sup> Alkon v. United States (C. C. A. 1st Cir.), 163 Fed. Rep. 810, 90
C. C. A. 116, 22 Am. B. R. 489.

<sup>7</sup> United States v. Comstock, 162 Fed. Rep. 415, 20 Am. B. R. 525 and 161 Fed. Rep. 644, 20 Am. B. R. 520. Wechsler v. United States (C. C. A. 2d Cir.), 158 Fed. Rep. 579, 86 C. C. A. 37, 19 Am. B. R. 1, it was held that false swearing "corruptly, knowingly, wilfully and contrary to his oath," is a charge of false swearing "knowingly and fraudulently."

<sup>1</sup> United States v. Comstock, 162 Fed. Rep. 415, 20 Am. B. R. 525.

<sup>2</sup> McNiel v. United States (C. C. A. 5th Cir.), 150 Fed. Rep. 82, 80 C. C. A. 36, 18 Am. B. R. 22; United States v. Comstock, 161 Fed. Rep. 644, 20 Am. B. R. 520; United States v. Jackson, 2 Fed. Rep. 502.

In United States v. Comstock, supra, Judge Brown said: "The de-

A charge of conspiracy to conceal assets by removing and concealing property prior to bankruptcy and that the concealment was continued after the bankruptcy and the property not scheduled by the bankrupt is sufficient.<sup>3</sup>

It has been held that a failure to allege specifically that the property concealed was the property of the bankrupt at the time of the adjudication, was a formal defect and not fatal.<sup>4</sup> No allegation of ownership is made essential by the statute, save that the property was "belonging to his estate in bankruptcy." <sup>5</sup>

It is not necessary to specify in the indictment the particular mode of concealment.<sup>6</sup> A charge of fraudulent concealment is due notice to the defendant that evidence may be offered against him of various modes of concealment.

# § 663. Averments in an indictment for perjury and false oath.

A person may be indicted for making a false oath in a bankruptcy proceeding under the bankrupt act, or for perjury under the Revised Statutes of the United States.<sup>1</sup>

fendant assigns as cause of demurrer the omission of the word 'wilfully.' The language of the statute used in the indictment is the substantial equivalent of a charge that the defendant did wilfully conceal."

<sup>8</sup> Cohen v. United States (C. C. A. 2d Cir.), 157 Fed. Rep. 651, 85 C. C. A. 113, 19 Am. B. R. 8; United States v. Cohn, 142 Fed. Rep. 983, 15 Am. B. R. 357; United States v. Stern, 186 Fed. Rep. 854; Radin v. United States (C. C. A. 2d Cir.), 189 Fed. Rep. 568. But see United States v. Grodson, 164 Fed. Rep. 157, 21 Am. B. R. 6

<sup>4</sup> United States v. Jackson, 2 Fed. Rep. 502.

<sup>6</sup> In United States v. Comstock, 161 Fed. Rep. 644, 20 Am. B. R. 520, the following averment was sustained by Judge Brown: That the defendant "did conceal a large amount of personal property which then and there belonged to the estate in bankruptcy, to-wit, a large number of cases containing shoes and footwear of leather and rubber, of great value; to-wit, of the value of ten thousand dollars, a more particular description of which is to the grand jurors aforesaid unknown."

<sup>6</sup> United States v. Comstock, 161 Fed. Rep. 644, 20 Am. B. R. 520.

<sup>1</sup> B. A. 1898, Sec. 29b, clauses 2 and 3; R. S. Sec. 5392; Wechsler v. United States (C. C. A. 2d Cir.), 158 Fed. Rep. 579, 86 C. C. A. 37, 19 Am. B. R. 1; United States v. Lake, 129 Fed. Rep. 499, 12 Am. B. R. 270.

Section 5392 of the Revised Statutes is as follows: "Sec. 5392. Every A false oath may occur in swearing to schedules, proof of a claim or any other paper filed in the bankruptcy proceedings, or in giving testimony at an examination under section 21 of the act, or any trial before the judge or referee.

An indictment under section 29b of the act, for making a false oath to his schedules may allege "that the accused, in compliance with the provisions of the bankrupt law, filed in the bankruptcy proceedings with the referee, the schedules required by law, subscribed and sworn to by him before a duly commissioned and acting notary public authorized as such to administer oaths, that he said upon his oath that the said schedules contained a true and complete statement of all of his property and estate, both real and personal, etc., and that the statement that he had on hand only the sum of \$100.00 and which was all the money he then and there had, was false, and then charged that he fraudulently and knowingly omitted from the schedules the sum of \$150,000.00 in lawful money of the United States," or choses in action giving the amounts and the parties from whom they are due.<sup>2</sup>

It is not necessary to describe the assets charged to have been omitted from the schedules with greater particularity.<sup>3</sup> It is not sufficient to aver that "the schedules did not contain a full, true and perfect account of all debts owing to him at that time," without specifying what debts were omitted.<sup>4</sup>

person who, having taken an oath before a competent tribunal, officer or person, in any case in which a law of the United States authorizes an oath to be administered that he will testify, declare, depose or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, wilfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by a fine of not more than two thousand dollars,

and by imprisonment, at hard labor, not more than five years; and shall, moreover, thereafter, be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed."

<sup>2</sup> United States v. Lake, 129 Fed. Rep. 499, 12 Am. B. R. 270.

<sup>3</sup> United States v. Lake, 129 Fed. Rep. 499, 12 Am. B. R. 270.

<sup>4</sup> Bartlett v. United States (C. C. A. 9th Cir.), 106 Fed. Rep. 884, 46 C. C. A. 19, 5 Am. B. R. 678; Rex v. Hepper, Ryan & M., 210.

It is not necessary to allege the materiality of the false statements made under oath where the allegation of materiality would be only a conclusion of law, but it should be averred when the allegations in the indictment are not so specific as to show their materiality.<sup>5</sup>

In an indictment for perjury for false testimony given by a bankrupt upon an examination under section 21a before a special commissioner, it is necessary to show that the oath was administered to the defendant by a person properly appointed and authorized to do so, but it is sufficient to show that the defendant took the oath, either before he began to testify or when he got through and signed his name to the testimony.<sup>6</sup>

If the indictment is framed under the Revised Statutes for perjury the omission to charge that the defendant took the oath alleged to be false "wilfully" is fatal. A charge of false swearing "corruptly, knowingly, wilfully and contrary to his oath" is equivalent to false swearing "knowingly and fraudulently" under section 29 of the act.<sup>7</sup>

### § 664. The trial.

The proceedings subsequent to the indictment are such as are regularly had in criminal cases in the federal courts.

The bankrupt act vests the courts of bankruptcy with jurisdiction to arraign, try, and punish bankrupts, etc., "in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of the laws of the United States." <sup>1</sup>

The trial is by jury according to the course of the common law. The court may exclude evidence of facts, which appear to it to be too remote to be material under the circumstances of the case.<sup>2</sup> The re-examination of witnesses with respect

<sup>&</sup>lt;sup>5</sup> United States v. Lake, 129 Fed. Rep. 499, 12 Am. B. R. 270.

<sup>&</sup>lt;sup>6</sup> United States v. Wechsler, 16 Am. B. R. 1.

<sup>Wechsler v. United States (C.
C. A. 2d Cir.), 158 Fed. 579, 86 C.
C. A. 37, 19 Am. B. R. 1.</sup> 

<sup>&</sup>lt;sup>1</sup> B. A. 1898, Sec. 2, clause 4. <sup>2</sup> Johnson v. United States (C. C. A. 1st Cir.), 170 Fed. Rep. 581, 95 C. C. A. 661, 22 Am. B. R. 359; Kern v. United States (C. C. A. 6th Cir.), 169 Fed. Rep. 617, 95 C. C. A. 145, 22 Am. B. R. 223.

to matters not brought out in cross-examination 3 and the order of putting in evidence 4 is within the discretion of the court.3

Recitals in the indictment that certain particulars are unknown to the grand jurors need not be proved.<sup>5</sup>

The competency of evidence, privilege of communication between husband and wife,<sup>6</sup> preserving exceptions to the admission of evidence and the charge of the court,<sup>7</sup> the settling of bills of exception and proceedings on writ of error are governed by the same law of procedure as in other criminal cases.<sup>8</sup>

A bail bond may be forfeited where the prisoner voluntarily goes into another jurisdiction where other indictments are pending and is there convicted and imprisoned.<sup>9</sup>

# § 665. Admissibility of schedules as evidence in a criminal case.

Prior to the repeal of section 860 of the Revised Statutes, schedules were not admissible, over the objection of the defendant, in a criminal proceeding for concealing property, on the ground that they were protected by that section.<sup>1</sup> Nor

Jacobs v. United States (C. C. A. 1st Cir.), 161 Fed. Rep. 694, 88
C. C. A. 554, 20 Am. B. R. 550.

<sup>4</sup> Cohen v. United States (C. C. A. 2d Cir.), 157 Fed. Rep. 651, 85 C. C. A. 113, 19 Am. B. R. 8.

Jacobs v. United States (C. C. A. 1st Cir.), 161 Fed. Rep. 694, 88
C. C. A. 554, 20 Am. B. R. 550.

\*Jacobs v. United States (C. C.
A. 1st Cir.), 161 Fed. Rep. 694, 88
C. C. A. 554, 20 Am. B. R. 550.

Johnson v. United States (C. C. A. 1st Cir.), 170 Fed. Rep. 581, 95
 C. C. A. 661, 22 Am. B. R. 359.

<sup>8</sup> See Loveland's Appellate Jurisdiction of Federal Courts, Secs. 125 to 136.

<sup>9</sup> United States v. Marrin, 170 Fed. Rep. 476.

¹ Johnson v. United States (C. C. A. 1st Cir.), 163 Fed. Rep. 30, 89 C. C. A. 508, 20 Am. B. R. 724; Cohen v. United States (C. C. A. 4th Cir.), 170 Fed. Rep. 715, 96 C. C. A. 35, 22 Am. B. R. 333.

Section 860 of the Revised Statutes read as follows: "No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture: *Provided*, That this section shall not exempt any party or witness from prosecution

was it proper to use them before the grand jury in obtaining an indictment of the bankrupt for concealment of his property.<sup>2</sup>

Since the repeal of that section,<sup>3</sup> schedules may be admitted in evidence against the bankrupt in a criminal proceeding for concealment of property or making a false oath. The schedules may be offered to show that certain property, which is claimed that the bankrupt withheld and concealed from the trustee, was not embraced in his schedules, or that the oath he made to them was in fact false.

He can not claim immunity under section 7, clause 9, of the act, because schedules are not testimony within the meaning of that provision.<sup>4</sup>

He is not protected by the fifth amendment of the Constitution of the United States, because he filed them voluntarily without claiming his privilege. The act requires him to file schedules of his assets and liabilities in both voluntary and involuntary cases.<sup>5</sup> If the bankrupt fails to file a schedule in involuntary bankruptcy the petitioning creditor may do so.<sup>6</sup> The schedule is made of his own motion and states such facts and such only as he, being in no way interrogated or cross-examined, may choose to state. It is not obtained from him by any judicial process which he is obliged to obey. If the bankrupt files his schedules in bankruptcy without reservation they may be offered as evidence against him like any other paper voluntarily signed by him, whether upon oath or not.<sup>7</sup>

The constitutional immunity must be seasonably claimed or it is warved.<sup>8</sup> In case books of account and papers relating to the business are delivered to the trustee without claiming the

and punishment for perjury committed in discovering or testifying as aforesaid." (Repealed by the act of May 7, 1910, 36 Stat. at L. 352.)

<sup>&</sup>lt;sup>2</sup> United States v. Chambers, 135 Fed. Rep. 1023, 13 Am. B. R. 708.

<sup>&</sup>lt;sup>3</sup> Act of May 7, 1910, 36 Stat. at L. 352, expressly repealed R. S. Sec. 860.

<sup>4</sup> Sec. 667, post.

<sup>&</sup>lt;sup>5</sup> Secs. 174 and 175, ante.

<sup>&</sup>lt;sup>6</sup> General Ord. No. 9.

<sup>&</sup>lt;sup>7</sup> Tucker v. United States, 151 U. S. 164, 38 L. Ed. 112.

<sup>&</sup>lt;sup>8</sup> Burrell v. Montana, 194 U. S. 572, 48 L. Ed. 1122; *In re* Tracy & Co., 177 Fed. Rep. 532, 24 Am. B. R. 539.

constitutional immunity, it is waived. For the same reason the bankrupt may waive his right to claim immunity by freely filing his schedules.

# § 666. Admissibility of books of account and papers as evidence in a criminal case.

Books of account and papers of the bankrupt, coming into the possession of a trustee or receiver in bankruptcy, may be offered in evidence, over defendant's objection and claim of privilege, in a criminal prosecution, in a state or federal court, against him.<sup>1</sup>

There is nothing in the bankrupt act which protects him from the use of evidence in a criminal prosecution, either in the federal or state courts, that may be obtained from books and documents to which the act vests title in the trustee.<sup>2</sup> The court may permit the trustee to deliver the books to the officers of a state court to aid in his prosecution.<sup>3</sup>

The bankrupt, however, is entitled to the protection of the constitutional provision that no man shall be compelled to be a witness against himself.<sup>4</sup> This privilege is personal and may be waived.<sup>5</sup> If the petitioner surrenders his books and papers

<sup>9</sup> In re Tracy & Co., 177 Fed. Rep. 532, 24 Am. B. R. 539.

In re Harris, 164 Fed. Rep. 292, 20 Am. B. R. 911, and 221 U. S. 274, in compelling delivery of books, claimed to contain incriminating evidence, to the trustee, the court protected the bankrupt from use of the books in aid of prosecution.

<sup>1</sup> Kerrch v. United States (C. C. A. 1st Cir.), 171 Fed. Rep. 366, 96 C. C. A. 258, 22 Am. B. R. 544; In re Tracy & Co., 177 Fed. Rep. 532, 24 Am. B. R. 539; State v. Strait, 94 Minn. 384. But see People v. Swarts, 24 Nat. Corp. Rep. 266, 8 Am. B. R. 487.

<sup>2</sup> Kerrch v. United States (C. C. A. 1st Cir.), 171 Fed. Rep. 366, 96

C. C. A. 258, 22 Am. B. R. 544; In re Hess, 134 Fed. Rep. 109, 14 Am. B. R. 559; In re Harris, 164 Fed. Rep. 292, 20 Am. B. R. 911; In re Tracy & Co., 177 Fed. Rep. 532, 24 Am. B. R. 539.

<sup>3</sup> In re Tracy & Co., 177 Fed. Rep. 532, 24 Am. B. R. 539.

<sup>4</sup> Fifth amendment to the constitution of the United States. *In re* Kanter & Cohen, 117 Fed. Rep. 356, 9 Am. B. R. 104; *In re* Harris, 164 Fed. Rep. 292, 20 Am. B. R. 911; *In re* Hess, 134 Fed. Rep. 109, 14 Am. B. R. 559.

Walker v. Brown, 161 U. S. 591,
 L. Ed. 819; In re Tracy & Co.,
 177 Fed. Rep. 532, 24 Am. B. R. 539.

without claiming the privilege at the time he waives it.<sup>6</sup> The bankrupt can not refuse to deliver books and papers in his possession to the trustee or receiver in bankruptcy.<sup>7</sup> If he wishes to be protected from the use of the books and papers in aid of prosecution, he should refuse to surrender them to the trustee on the ground that they would tend to incriminate him. The court will inquire into the matter and make such order as may be required to protect him from the use of the books and papers in aid of a criminal prosecution.<sup>8</sup> In such cases the books and papers can not be offered in evidence over the objection of the defendant.

# § 667. Admissibility of prior testimony of the bankrupt against him in a criminal case.

The act provides that no testimony given by the bankrupt shall be offered in evidence against him in a criminal proceeding.<sup>1</sup>

The immunity given to the bankrupt by this provision applies to criminal prosecutions in the state and federal courts, because the bankrupt law is binding on both courts.

It will be noted that the immunity granted to the bankrupt relates to testimony given by him at creditors' meetings, where he may be examined as to his dealings with his creditors and other persons, the whereabouts of his property, and all matters which may affect the administration and settlement of his estate.<sup>2</sup>

<sup>6</sup> In re Tracy & Co., 177 Fed. Rep. 532, 24 Am. B. R. 539; Kerrch v. United States (C. C. A. 1st Cir.), 171 Fed. Rep. 366, 96 C. C. A. 258, 22 Am. B. R. 544.

<sup>7</sup> Matter of Harris, 221 U. S. 274. <sup>8</sup> In re Harris, 221 U. S. 274; In re Harris, 164 Fed. Rep. 292, 20 Am. B. R. 911; In re Hess, 134 Fed. Rep. 109, 14 Am. B. R. 559; and 136 Fed. Rep. 988, 14 Am. B. R. 826; In re Hark, 136 Fed. Rep. 986, 14 Am. B. R. 624.

<sup>1</sup> B. A. 1898, Sec. 7, clause 9.

<sup>2</sup> B. A. 1898, Sec. 7, clause 9;

Glickstein v. United States, 222 U. S. 139, 55 L. Ed. —; Edelstein v. United States (C. C. A. 8th Cir.), 149 Fed. Rep. 636, 79 C. C. A. 328, 17 Am. B. R. 649; In re Hess, 134 Fed. Rep. 109, 14 Am. B. R. 559; United States v. Brod, 176 Fed. Rep. 165, 23 Am. B. R. 740; Wechsler v. United States (C. C. A. 2d Cir.), 158 Fed. Rep. 579, 86 C. C. A. 37, 19 Am. B. R. 1.

In Edelstein v. United States (supra), construing this provision, Judge Adams, speaking for the circuit court of appeals for the eighth

Section 7, clause 9, limits the immunity to the use of the testimony of the bankrupt and does not prevent the trustee from making use of other evidence which may come from the bankrupt voluntarily. It does not protect the bankrupt against the use of the petition, schedules, and application for a discharge, or other papers filed by the bankrupt in the bankruptcy proceedings as evidence in a criminal proceeding against him.<sup>3</sup> They are not testimony in the sense that the word is used. There is nothing in this section which extends that immunity to the use of books of account or other documents relating to the business of the bankrupt.<sup>4</sup>

The immunity in this provision relates to the use of the bankrupt's testimony in a criminal prosecution, which may arise out of the conduct of his business, the disposition of his property and other past transactions about which the statute authorized the examination to be made. It does not extend to prosecutions for offenses condemned by the bankrupt act.<sup>5</sup> It

circuit, said: "The examination there contemplated relates to past transactions. Such examination might, from the nature of the case, in view of the penal provisions of the act, disclose evidence of former criminal conduct on the part of the bankrupt. Such evidence, however, was deemed so important and necessary for the proper administration of the estates of bankrupts that Congress, in effect, in the concluding portion of subdivision 9, makes a proposition to the bankrupt that, if he would forego his constitutional privilege to refuse to testify about his past transactions in so far as they might tend to incriminate him, no testimony which he might give should be used against him 'in any criminal proceedings."

<sup>3</sup> Commonwealth v. Ensign, 40 Pa. Super. Ct. 157, 22 Am. B. R. 797.

<sup>4</sup> Kerrch v. United States (C. C. A. 1st Cir.), 171 Fed. Rep. 366, 96 C. C. A. 258, 22 Am. B. R. 544; In

re Hess, 134 Fed. Rep. 109, 14 Am. B. R. 599; In re Harris, 164 Fed. Rep. 292, 20 Am. B. R. 911; In re 'Tracy & Co., 177 Fed. Rep. 532, 24 Am. B. R. 539.

<sup>5</sup> Glickstein v. United States, 222 U. S. 139, 55 L. Ed. -; in Edelstein v. United States (C. C. A. 8th Cir.), 149 Fed. Rep. 636, 79 C. C. A. 328, 17 Am. B. R. 649, construing Sec. 7, subdivision 9, Judge Adams, speaking for the court of appeals for the eighth circuit, said: "What criminal proceeding do these words relate to? Obviously, to such as might arise out of the conduct of his business, the disposition of his property, and other past transactions, about which alone the statute authorized the examination in question to be made. The immunity was made conditional upon his giving testimony upon subjects out of which prosecutions against him might flow. A most natural and reasonable inference, therefore, is that Congress intended the imdoes not extend to a prosecution for perjury or making a false oath in an examination, or a paper filed, in the bankruptcy proceedings.<sup>6</sup>

Prior to the repeal of section 860 of the Revised Statutes of the United States it was held that the testimony, given by a witness under subpœna in a bankruptcy proceeding, could not be given in evidence against him in a subsequent criminal prosecution.<sup>7</sup> This section has been repealed.<sup>8</sup>

### § 668. The sentence.

The punishment for offenses committed under subdivision b of section 29 is imprisonment for a period of not to exceed two years.

The punishment prescribed for offenses, committed by a referee or trustee, under subdivision c of section 29 is a fine not to exceed \$500.00, and forfeiture of his office.

Where a different punishment is provided for the same offense by the Revised Statutes and the Bankruptcy Act, the sentence should conform to the penalty prescribed by the Bankruptcy Act.<sup>1</sup> In case the trial court imposes sentence under the wrong statute the case may be remanded with instructions to enter a new sentence according to law.<sup>2</sup>

munity to relate to the use of his evidence in such criminal prosecutions only."

<sup>6</sup>Glickstein v. United States, 222 U. S. 139, 55 L. Ed. —; Wechsler v. United States (C. C. A. 2d Cir.), 158 Fed. Rep. 579, 86 C. C. A. 37, 19 Am. B. R. 1; Edelstein v. United States (C. C. A. 8th Cir.), 149 Fed. 636, 79 C. C. A. 328, 17 Am. B. R. 649; United States v. Brod, 176 Fed. Rep. 165, 23 Am. B. R. 740.

But see United States v. Simon, 146 Fed. Rep. 89, 17 Am. B. R. 41.

<sup>7</sup> Alkon v. United States (C. C. A. 1st Cir.), 163 Fed. Rep. 810, 90 C. C. A. 116, 22 Am. B. R. 489.

8 Act of May 7, 1910, 36 Stat. at L. 352.

<sup>1</sup> Wechsler v. United States (C. C. A. 2d Cir.), 158 Fed. Rep. 579, 86 C. C. A. 37, 19 Am. B. R. 1.

Wechsler v. United States (C. C.
 A. 2d Cir.), 158 Fed. Rep. 579, 86
 C. C. A. 37, 19 Am. B. R. 1.

In Williams v. United States, 168 U. S. 382, 389, 42 L. Ed. 509, the supreme court said: "It is proper also to observe that there was error in the judgment as to the fine and imprisonment imposed upon the accused. Section 5481 of the Revised Statutes provides that the fine should not exceed \$500, nor the imprisonment more than one year. If this were the only error complained of, the result would not be an entire failure of the prosecutions, for it would only be necessary for the court below to enter a new judgment, imposing such fine or imprisonment, or both, as the statute permitted."

#### CHAPTER XXXIV.

#### CONTEMPT.

SEC.	
669.	Who has the power to commit.
670.	Failure to turn over property
	when ordered.
671.	Violation of injunction.
	Notice of the order of court.
673.	Defenses-Inability to comply with
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675.	Disobedience.
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Violation of lawful orders only. Nature of proceedings-Criminal or civil. SEC. Where the contemnor is outside—the district.
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tion. Notice-Attachment. 681.

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for contempt.

## § 669. Who has the power to commit.

The power to punish for contempt is inherent in all courts. of the United States.1 But the power is expressly conferred upon courts of bankruptcy to enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fineor imprisonment, or fine and imprisonment, and to punish persons for contempts committed before referees.<sup>2</sup> A refereehas no power to punish a contempt.3

<sup>1</sup> Ex parte Robinson, 19 Wall. 510, 22 L. Ed. 205; Besette v. Conkey Co., 194 U. S. 324, 48 L. Ed. 997.

<sup>2</sup> B. A. 1898, Sec. 2, clauses 13 and 16, and Sec. 41.

In Boyd v. Glucklich (C. C. A. 8th Cir.), 116 Fed. Rep. 131, 8 Am. B. R. 393, the court construing this section, said:

"By reference to section 41 it will be seen that 'the things forbidden in this section,' concerning which the referee is required to certify the facts to the judge, include only those things would be punishable as contempts by all courts of record. They are the common and familiar heads for

the exercise of this jurisdiction by all courts of record. No new or enlarged jurisdiction is conferred. and no power to impose a punishment which might not rightly and lawfully be imposed, on a similar state of facts, by any other United States court, Any act, matter, or thing which any United States court may punish as a contempt may be punished as such by a court of bankruptcy; and any act, matter,. or thing which can not be punished as a contempt by other United States courts can not be punished as such by a court of bankruptcy." <sup>3</sup> B. A. 1898, Sec. 41; Bank of Ravenswood v. Johnson (C. C. A. 4th Cir.), 143 Fed. Rep. 463, 16-

## § 670. Failure to turn over property when ordered.

The court has power to order a bankrupt to pay over to his trustee, or some person duly authorized, money found to be in his possession or control and property belonging to his estate, and if the bankrupt fails to obey such order the court may commit him for contempt until he complies.<sup>4</sup>

It is a contempt of court for the bankrupt to deliver property in his possession to a third party claiming to own it. The claimant should apply to the court for surrender of the property. The same rule has been applied in cases of an agent or bailee of property of the bankrupt. It is a sufficient answer to a rule to show cause why he should not be punished for contempt for refusing to obey an order to turn over property to the bankrupt's trustee, to show that the property is not in his possession or under his control.

Am. B. R. 206; Smith v. Belford (C. C. A. 6th Cir.), 106 Fed. Rep. 658, 5 Am. B. R. 291; Boyd v. Glucklich (C. C. A. 8th Cir.), 116 Fed. Rep. 131, 8 Am. B. R. 393.

\*In re Rosser (C. C. A. 8th Cir.), 101 Fed. Rep. 562, 4 Am. B. R. 153; Ripon Knitting Wks. v. Schreiber, 101 Fed. Rep. 810, 4 Am. B. R. 209; In re Schlesinger (C. C. A. 2d Cir.), 102 Fed. Rep. 117, 4 Am. B. R. 361; In re Wilson, 116 Fed. Rep. 419, 8 Am. B. R. 612; In re Greenberg, 106 Fed. Rep. 496, 5 Am. B. R. 840; In re Purvine (C. C. A. 5th Cir.), 96 Fed. Rep. 192, 2 Am. B. R. 787; In re Gerstel, 123 Fed. Rep. 166, 10 Am. B. R. 411; In re Holland, 176 Fed. Rep. 624, 23 Am. B. R. 835.

<sup>5</sup> In re Potteiger, 181 Fed. Rep. 640, 24 Am. B. R. 648,

<sup>6</sup> Mueller v. Nugent, 184 U. S. 1, 46 L. Ed. 405, 7 Am. B. R. 224; *In re* Feldser, 134 Fed. Rep. 307, 14 Am. B. R. 216.

<sup>7</sup> Boyd v. Glucklich (C. C. A. 8th Cir.), 116 Fed. Rep. 131, 8 Am. B.

R. 393; Ex parte Comingor (C. C. A. 6th Cir.), 107 Fed. Rep. 898, 5 Am. B. R. 537, affirmed, 184 U. S. 18, 46 L. Ed. 413, 7 Am. B. R. 421; In re Cole (C. C. A. 1st Cir.), 144 Fed. Rep. 392, 16 Am. B. R. 302; In re Davison, 143 Fed. Rep. 673, 16 Am. B. R. 337; Samel v. Dodd (C. C. A. 5th Cir.), 142 Fed. Rep. 68, 16 Am. B. R. 163; In re Adler, 170 Fed. Rep. 634, 21 Am. B. R. 371; In re Mize, 172 Fed. Rep. 945, 22 Am. B. R. 577; In re Goldfarb Bros., 131 Fed. Rep. 643, 12 Am. B. R. 386.

The petition of the trustee to have the bankrupt declared in contempt for failure to obey an order to turn over property need not contain an allegation of his present ability to comply with the order. That is more properly a matter of defense. When the papers in the case show that concealment has been determined after a full hearing, and that he has been duly served and failed to comply with an order to turn

It is not contempt of court to refuse to deliver property to the agent of a receiver.8

Where the person having possession of property claimed by the bankrupt sets up an adverse claim in himself to the property, he is entitled to a plenary suit. In such cases he can not be required to answer a rule to show cause in a summary proceeding for disobedience of an order to turn over to the trustee such property. 10

## § 671. Violation of injunction.

The courts have frequently been called upon in the exercise of general jurisdiction to determine what constitutes contempt of court in the disobedience or resistance of an injunction order.

Generally, to do the thing enjoined is contempt, and it has been held to be a violation of an injunction for the person enjoined to be present at the commission of the act, aiding and abetting, although not actually taking part in it, 11 or to do the act enjoined as agent or servant of another person. 12

The mere fact that a person did not think that his act

over property sufficient is charged to put him upon his defense. *In re* Stavrahn (C. C. A. 2d Cir.), 174 Fed. Rep. 330, 23 Am. B. R. 168. <sup>8</sup> Skubinsky v. Bodek (C. C. A. 3d Cir.), 172 Fed. Rep. 340, 97 C.

C. A. 38.
Louisville Trust Co. v. Comingor, 184 U. S. 18, 46 L. Ed. 413, 7
Am. B. R. 421.

<sup>10</sup> Louisville Trust Co. v. Comingor, 184 U. S. 18, 46 L. Ed. 413, 7 Am. B. R. 421.

<sup>11</sup> Dunks v. Gray, 3 Fed. Rep. 868; St. John's College v. Carter, 8 Law Jour. Eq. N. S. 218; Societe v. Western Distilling Co.; 42 Fed. Rep. 96.

In In re Wall, 13 Fed. Rep. 818, the court said: "I am too well

aware of his influence in this community not to know that his presence would be ample encouragement to others on such an occasion. It is not alone by words that one advises and encourages, and the fact of his presence and action is sufficient not only to find an encouraging thereby, but raise the presumption on his doing the same by words."

Such an order is not a "proceeding in bankruptcy," but is the exercise of the court's power to preserve order. Morehouse v. Pacific Hardware & Steel Co. (C. C. A. 9th Cir.), 177 Fed. 337, 100 C. C. A. 647, 24 Am. B. R. 178.

<sup>12</sup> Dunks v. Gray, 3 Fed. Rep. 868,
 41 Vt. 246.

amounted to a violation of the injunction, is no defense,<sup>18</sup> nor the fact that he acted under advice of counsel.<sup>14</sup> But where the violation of an injunction order is not willful this fact may be considered in mitigation of the punishment to be imposed.<sup>15</sup>

Active concealment and transfer of property belonging to the trustee may be punished as a criminal contempt in the absence of specific injunction as the bankruptcy itself is an injunction against the interference of the bankrupt with his property, <sup>16</sup> and so where the bankrupt after filing the petition surrendered mortgaged property to the mortgagee. <sup>17</sup>

#### § 672. Notice of the order of court.

It is a contempt to violate an injunction after the person enjoined has had notice. 18

It is not necessary that the respondent be served with a copy of the order of the court, if knowledge of its contents came to him otherwise.<sup>19</sup> This has been held true even when he

<sup>13</sup> Atlantic, etc., Co. v. Dittmar Co., 9 Fed. Rep. 316.

14 United States v. Goldstein, 132 Fed. Rep. 789, 12 Am. B. R. 755; In re Krinsky Bros., 112 Fed. Rep. 972, 7 Am. B. R. 535; Burr v. Kimbark, 29 Fed. Rep. 432; United States v. Memphis, etc., R. R. Co., 6 Fed. Rep. 238; Goodyear v. Mullee, No. 5577 Fed. Cas., 5 Blatch. 429; Ulman v. Ritter, 72 Fed. Rep. 1000; Societe v. Western Distilling Co., 42 Fed. Rep. 96.

<sup>15</sup> Morss v. Sewing Machine Co., 38 Fed. Rep. 482; Iowa Barb Wire Co. v. Southern Co., 30 Fed. Rep. 615.

<sup>16</sup> Clay v. Waters (C. C. A. 8th Cir.), 178 Fed. Rep., 385, 101 C. C. A. 645, 24 Am. B. R. 293.

<sup>17</sup> In re Arnett, 112 Fed. Rep. 770, 7 Am. B. R. 522.

<sup>18</sup> In re Krinsky, 112 Fed. Rep. 972, 7 Am. B. R. 535; In re Cary, 10 Fed. Rep. 622. See notes to this case for discussion of contempt. In re Schwartz, 14 Fed. Rep. 787; Ulman v. Ritter, 72 Fed. Rep. 1000; Tolelo, etc., R. R. Co. v. Penn. Co., 54 Fed. Rep. 746.

<sup>19</sup> In re Krinsky Bros., 112 Fed. Rep. 972, 7 Am. B. R. 535; Blake v. Nesbet, 144 Fed. Rep. 279, 16 Am. B. R. 269.

In re Lennon, 166 U. S. 548, 554, 41 L. Ed. 1110, the supreme court said:

"The facts that petitioner was not a party to such suit, nor served with process of subpœna, nor had notice of the application made by the complainant for the mandatory injunction, nor was served by the officers of the court with such injunction,

was beyond the territorial jurisdiction of the court of bankruptcy at the time.<sup>20</sup>

# § 673. Defenses—Inability to comply with order.

Where a person has used due diligence to comply with the orders of the court, he is not guilty of contempt.<sup>21</sup>

It is well settled that a showing made by a respondent that he is unable to do an act required of him upon an order to show cause is a sufficient answer.<sup>22</sup> It matters not for the purpose of such a proceeding that the inability to do the thing required may be in consequence of his own fault arising from a mere misconception of his rights or was committed before the court took jurisdiction of the matter. The court can not compel an impossibility. The court must be satisfied beyond a reasonable doubt that the respondent can comply with its order to be justified in adjudging him guilty of contempt.<sup>23</sup> The uncorroborated evidence of a bankrupt of his inability to comply with the order is far from controlling.<sup>24</sup>

are immaterial, so long as it was made to appear that he had notice of the issuing of an injunction by the court. To render a person amenable to an injunction it is neither necessary that he should have been a party to the suit in which the injunction was issued, nor to have been actually served with a copy of it, so long as he appears to have had actual notice."

<sup>20</sup> Blake v. Nesbet, 144 Fed. Rep. 279, 16 Am. B. R. 269.

<sup>21</sup> In re Carpenter, No. 2427 Fed. Cas., 1 N. B. R. 299.

Boyd v. Glucklich (C. C. A. 8th Cir.), 116 Fed. Rep. 131, 8 Am.
B. R. 393; In re Felson, 124 Fed. Rep. 288, 10 Am. B. R. 716; Exparte Comingor (C. C. A. 6th Cir.), 107 Fed. Rep. 898, 5 Am. B. R. 537; In re Goldfarb Bros., 131 Fed. Rep. 643, 12 Am. B. R. 386; In re Adler,

170 Fed. Rep. 634, 21 Am. B. R. 371; In re Mize, 172 Fed. Rep. 945, 22 Am. B. R. 577; Hendryx v. Fitzpatrick, 19 Fed. Rep. 810, 814, per Lowell and Nelson, judges; In re Chiles, 22 Wall. 157, 168, 22 L. Ed. 819; Kane v. Haywood, 66 N. C. 1; In re Hauseman (C. C. A. 2d Cir.), 121 Fed. Rep. 984, 10 Am. B. R. 64. 23 American Trust Co. v. Wallis (C. C. A. 3d Cir.), 126 Fed. Rep. 464, 11 Am. B. R. 360; In re Goldfarb Bros., 131 Fed. Rep. 643, 12 Am. B. R. 386; In re Switzer, 140 Fed. Rep. 976, 15 Am. B. R. 468;

68, 16 Am. B. R. 163.

<sup>24</sup> In re Henderson, 130 Fed. Rep.
385, 12 Am. B. R. 351; Schweer v.
Brown (C. C. A. 8th Cir.), 130
Fed. Rep. 328, 12 Am. B. R. 178;
In re Leinweber, 128 Fed. Rep.

In re Davison, 143 Fed. Rep. 673,

16 Am. B. R. 337; Samel v. Dodd

(C. C. A. 5th Cir.), 142 Fed. Rep.

## § 674. Advice of counsel.

In the ordinary case of advising clients if an attorney gives his advice in good faith and in the honest belief that it is well founded and in the just interest of his client, he can not be held for contempt for error in judgment.<sup>25</sup>

Where judicial action is alleged to have been induced by the advice of counsel complained of, on the ground that there is conspiracy between the state court and the attorneys to obstruct the administration of justice, the attorneys can not be punished for contempt.<sup>26</sup>

#### § 675. Disobedience.

If the bankrupt disobeys or resists any lawful order of a referee, he is liable to be committed by the judge for contempt.<sup>27</sup>

It is a contempt to disobey or resist any lawful process of the court duly served, as a subpœna to a witness to testify in court,<sup>28</sup> or before a referee,<sup>29</sup> or to produce written documents,<sup>30</sup> or a final decree or interlocutory order of the court.<sup>31</sup>

641, 12 Am. B. R. 175; In re Shachter, 119 Fed. Rep. 1010, 9 Am. B. R. 499.

<sup>25</sup> In re Watts and Sachs, 190 U. S. 1, 47 L. Ed. 933, 10 Am. B. R. 113.

<sup>28</sup> In re Watts & Sachs, 190 U. S. 1, 47 L. Ed. 933, 10 Am. B. R. 113.

<sup>27</sup> B. A. 1898, Sec. 41a and Sec. 2, clause 16.

28 B. A. 1898, Sec. 21a; Carman
v. Emerson, 71 Fed. Rep. 264, 18
C. C. A. 38; United States v. Caldwell, 2 Dall. 333; Norris v. Hassler, 23 Fed. Rep. 581; In re Ellerbe, 13 Fed. Rep. 530.

<sup>29</sup> B. A. 1898, Sec. 21a and Sec. 41; *In re* Howard, 95 Fed. Rep. 415, 2 Am. B. R. 582; *In re* Spofford, 62 Fed. Rep. 443; Johnson

Steel Co. v. N. B. Steel Co., 48 Fed. Rep. 191; *In re* Allen, No. 208 Fed. Cas., 13 Blatch. 271.

In re Kerber, 125 Fed. Rep. 653, 10 Am. B. R. 747, it was held that mileage and fee for one day's attendance must be paid or tendered witness before he could be attached for contempt. In re Home Discount Co., 147 Fed. Rep. 538, 17 Am. B. R. 168; In re Sorkin, 166 Fed. Rep. 831, 20 Am. B. R. 637.

<sup>30</sup> B. A. 1898, Sec. 41.

31 Bankrupt may be adjudged guilty of contempt for refusing to file schedules, for refusing to surrender books, for false swearing upon examination under Sec. 21a, and for giving vague and evasive testimony. In re Fellerman, 149 Fed. 244, 17 Am. B. R. 785.

#### § 676. Misbehavior.

A court of bankruptcy may undoubtedly punish a person who has misbehaved in the presence of the court; 32 or so near thereto as to obstruct the administration of justice, as on a piazza adjoining the courtroom,33 or in a jury-room or hall,34 or before a referee,35 or where there has been misbehavior of any officer of the court in his official transactions, as where one of its officers refuses to pay over money due from him in his official capacity,36 or where a witness refuses to be sworn according to law,37 or where a witness refuses to answer questions in court or before a referee,38 or where there has been disobedience or resistance by a bankrupt, officer, or other person to any lawful writ, process, order, rule or decree, or command of the court, 39 or where the bankrupt withdraws from the office of the referee before the completion of his examination,40 or where there has been an assault on an officer of the court, as upon a trustee in the performance of the duties of his office.41

# § 677. Violation of lawful orders only.

It should be observed that it is only lawful orders the disobedience of which may be punished for contempt. It has

<sup>32</sup> United States v. Patterson, 26 Fed. Rep. 509; Blight v. Fisher, No. 1542 Fed. Cas., Pet. C. C. 41.

88 United States v. Carter, No. 14740, 3 Cranch, C. C. 423; Ex parte Salkey, No. 12253 Fed. Cas. 6 Biss. 269, affirmed on petition for habeas corpus, No. 12254 Fed. Cas., 6 Biss. 280.

84 See *In re* Savin, 131 U. S. 267,33 L. Ed. 150.

<sup>35</sup> B. A. 1898, Sec. 2, clause 16; Sharon v. Hill, 24 Fed. Rep. 726; United States v. Anonymous, 21 Fed. Rep. 761.

<sup>36</sup> In re Pittman, No. 11184 Fed. Cas., 1 Curtis 186; Jeffries v. Laurie, 27 Fed. Rep. 198; In re Paschal, 10 Wall. 491, 19 L. Ed. 992; Bogart v. Supply Co., 27 Fed. Rep. 722.

<sup>37</sup> B. A. 1898, Sec. 21a; In re
 Howard, 95 Fed. Rep. 415, 2 Am.
 B. R. 582.

<sup>38</sup> B. A. 1898, Sec. 21a; United States v. Goldstein, 132 Fed. Rep. 789, 12 Am. B. R. 755.

<sup>39</sup> B. A. 1898, Sec. 2, clause 13;
Mueller v. Nugent, 184 U. S. 1, 46
L. Ed. 405, 7 Am. B. R. 224; *In re* Fellerman, 149 Fed. 244, 17 Am. B. R. 785.

<sup>40</sup> In re Vogel, No. 16984 Fed. Cas., 5 N. B. R. 393.

<sup>41</sup> Ex parte O'Neal, 125 Fed. Rep. 967, 11 Am. B. R. 196.

been said that an order of court "does not mean a written order always, but only an exercise of authority constituting a requirement.<sup>42</sup>

The power of the court of bankruptcy to punish for the disobedience of its orders extends only to such orders as actually exist. An order actually made by the court is binding until reversed or set aside, even though the court making it is without jurisdiction. The question as to whether the act constitutes a contempt of an order of court usually arises, however, upon a writing, as upon an order to deliver property by the bankrupt, or an order of injunction. If, however, the court is without power to make the order, it is without power to punish for a disobedience of it.

## § 678. Nature of proceedings—Criminal or civil.

Proceedings for contempt are of two classes, criminal and civil.46\*

For the purpose of punishing the guilty party for his disrespect to the court or its order, the proceeding is criminal.<sup>47</sup>

<sup>42</sup> Bridges v. Sheldon, 7 Fed. Rep. 45.

43 Bridges v. Sheldon, 7 Fed. Rep. 14, 18 C. C. A. 410.

44 Worden v. Searls, 121 U. S. 14, 30 L. Ed. 853; In re Eaton, 51 Fed. Rep. 804; Wagner v. United States (C. C. A. 6th Cir.), 104 Fed. Rep. 133, 4 Am. B. R. 596; Blake v. Nesbet, 144 Fed. Rep. 279, 16 Am. B. R. 269.

45 Mueller v. Nugent, 184 U. S. 1, 46 L. Ed. 405, 7 Am. B. R. 224; In re Leinweber, 128 Fed. Rep. 641, 12 Am. B. R. 175; In re Schlesinger (C. C. A. 2d Cir.), 102 Fed. Rep. 117, 4 Am. B. R. 361; In re Rosser (C. C. A. 8th Cir.), 101 Fed. Rep. 562, 4 Am. B. R. 153.

46 Louisville Trust Co. v. Com-

ingor, 184 U. S. 18, 46 L. Ed. 413, 7 Am. B. R. 421.

46\* Clay v. Waters (C. C. A. 8th Cir.), 178 Fed. Rep. 385, 101 C. C. A. 645, 24 Am. B. R. 293; Doyle v. London Guarantee Co., 204 U. S. 599, 51 L. Ed. 641; Bessette v. Conkey Co., 194 U. S. 324, 48 L. Ed. 997.

47 Bessette v. Conkey Co., 194 U. S. 324, 48 L. Ed. 997; In re Christensen Engineering Co., 194 U. S. 458, 48 L. Ed. 1072; New Orleans v. Steamship Co., 20 Wall. 393, 22 L. Ed. 354; Ex parte Kearney, 7 Wheat. 38, 5 L. Ed. 391; In re Manning, 44 Fed. Rep. 275; United States v. Berry, 24 Fed. Rep. 780; In re Ellerbe, 13 Fed. Rep. 530. See Moody v. Cole, 148 Fed. Rep. 295, 17 Am. B. R. 818.

Where the bankrupt at the date of his adjudication, has a large sum of money which he conceals from his trustee and uses to buy real estate which he conveys when the trustee commences action to acquire it, this is a criminal contempt of court and an affront to the dignity of the court. 48 If a person refuses to obey a subpœna, 48\* or refuses to answer questions or persistently makes false and evasive answers, 48\*\* it is a criminal offense and he may be punished for contempt of court.

Disobedience of an injunction staying an independent suit or proceedings is a criminal offense. 48†

As a means of compelling obedience to some lawful order requiring the party to perform some act or duty required of him, and which he refuses to perform, the proceedings may be civil or criminal:<sup>49</sup> Thus, if the respondent had in his possession property, and is ordered to deliver it to the court, or some person named by the court, within a fixed time, and he willfully refuses to obey the order, it being within his power to do so, then a civil process of contempt may be resorted to as a means of compelling obedience to the order of the court, and the party refusing to obey may be confined and

<sup>48</sup> Clay v. Waters (C. C. A. 8th Cir.), 178 Fed. Rep. 385, 101 C. C. A. 645, 24 Am. B. R. 293.

48\* In re Ellerbe, 13 Fed. Rep. 530; United States v. Jacobi, No. 15460 Fed. Cas., 1 Flipp. 108; In re Manning, 44 Fed. Rep. 275.

48\*\* In re Singer, 174 Fed. Rep. 208, 23 Am. B. R. 28; In re Gitkin, 164 Fed. Rep. 71, 21 Am. B. R. 113; In re Schulman, 167 Fed. Rep. 237, 21 Am. B. R. 288; In re Fellerman, 149 Fed. Rep. 244, 17 Am. B. R. 785; In re Kretsch, 172 Fed. Rep. 523, 22 Am. B. R. 284; In re Bronstein, 182 Fed. Rep. 349, 24 Am. B. R. 524.

<sup>48†</sup> Morehouse v. Pacific Hdwe. & Steel Co. (C. C. A. 9th Cir.), 177 Fed. Rep. 337, 100 C. C. A. 647, 24 Am. B. R. 178.

<sup>49</sup> Bessette v. Conkey Co., 194 U. S. 324, 48 L. Ed. 997; In re Christensen Engineering Co., 194 U. S. 458, 48 L. Ed. 1072; Worden v. Searles, 121 U. S. 26, 30 L. Ed. 853; Hayes v. Fischer, 102 U. S. 122, 26 L. Ed. 95; In re Graves, 29 Fed. Rep. 60, 4 Blackstone's Com. 285; Wells, Fargo & Co. v. Oregon Co., 19 Fed. Rep. 20.

In Hendryx v. Fitzpatrick, 19 Fed. Rep. 810, on page 813, Judge Lowell observed: "If the proceeding should be criminal in form it would make no difference. A criminal sentence for the benefit of a private person is to be treated as civil to all intents and purposes." See also observation of Mr. Justice Miller in *In re* Chiles, 22 Wall. 168, 22 L. Ed. 819.

imprisoned until he performs the act required of him or shows that it is not in his power to do it.<sup>50</sup> He may also be proceeded against criminally, because the disrespect being willful, it is an offense against the government.

## § 679. Where the contemnor is outside the district.

The court in which the contempt is committed is the only court with power to punish the person guilty of contempt. No other court can punish him.<sup>1</sup>

A person charged with criminal contempt may be reached by proceedings under section 1014 of the Revised Statutes when found in another district, and may be arrested there, and then transferred in the usual manner under that section.<sup>2</sup>

A civil contempt is not a criminal offense and therefore not within the provisions of section 1014 of the Revised Statutes. A person charged with a civil contempt can not be removed from one district to another for trial.<sup>3</sup>

# § 680. Practice in contempt cases—Petition.

Proceedings in contempt should not be instituted before the contempt has been committed. A proceeding for contempt is of a different character from one resulting in a mere order, as for the payment of money to the trustee or granting an injunction.

The mode of proceeding in a court of bankruptcy to determine whether a constructive contempt has been committed should conform to the established practice in like cases in all other United States courts as near as may be, and what is

<sup>50</sup> Mueller v. Nugent, 184 U. S. 1, 46 L. Ed. 405, 7 Am. B. R. 224; *In re* Levy & Co. (C. C. A. 2d Cir.), 142 Fed. Rep. 442, 15 Am. B. R. 166, and cases cited in the opinion; *In re* Salkey, No. 12254 Fed. Cas., 6 Biss. 280.

<sup>1</sup> United States v. Berry, 24 Fed. Rep. 780; *In re* Litchfield, 13 Fed. Rep. 863.

<sup>2</sup> For proceedings in such cases, see Sec. 643, et seq., ante. In re Manning, 44 Fed. Rep. 275; United States v. Jacobi, No. 15460 Fed. Cas., 1 Flipp. 108; In re Ellerbe, 13 Fed. Rep. 530; Castner v. Pocahontas Collieries Co., 117 Fed. Rep. 184.

<sup>3</sup> In re Graves, 29 Fed. Rep. 60.

legally sufficient to purge a contempt in the other courts of the United States is sufficient to purge the like contempt in a court of bankruptcy.<sup>51</sup>

Two persons may be jointly proceeded against for contempt.<sup>51</sup>\*

It is proper and probably better practice to bring the question of contempt to the attention of the court by a petition or motion for rule to show cause. The practice in the federal courts in contempt proceedings has been far from uniform in this respect.

In case the proceedings are instituted to punish a contempt committed before a referee, they are commenced by a certificate of the referee.<sup>52</sup>

The judge thereupon, in a summary manner, hears the evidence as to the acts complained of, and if it is such as to warrant him in so doing, punishes such person in the same manner and to the same extent as for a contempt committed before the court of bankruptcy, or commits such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of, or in the presence of, the court.

The petition or motion may be entitled and filed in the original action.<sup>54</sup> Where the proceeding is criminal, and punishment is asked for, it may be instituted in the name of the United States.<sup>55</sup> The petition should state the names of

<sup>51</sup> Boyd v. Glucklich (C. C. A. 8th Cir.), 116 Fed. Rep. 131, 8 Am. B. R. 393.

51\* In re Fellerman, 149 Fed. Rep. 244, 17 Am. B. R. 785.

<sup>52</sup> B. A. 1898, Sec. 41*b*; United States v. Goldstein, 132 Fed. Rep. 789, 12 Am. B. R. 755. See United States v. Anonymous, 21 Fed. Rep. 761.

Where a bankrupt persistently evaded making direct answers to the questions concerning a subject about which he could not have been ignorant, in an examination before

the referee he should certify the facts and ask the court to grant a rule and fix a day for the hearing. *In re* Singer, 174 Fed. Rep. 208, 23 Am. B. R. 28; Magen v. Campbell (C. C. A. 3d Cir.), 180 Fed. Rep. 675, 26 Am. B. R. 594.

54 See Creditors v. Cozzens, No. 3378 Fed. Cas., 3 N. B. R. 281.

55 As in United States v. Atcheson R. S. Co., 16 Fed. Rep. 853; United States v. Murphy, 44 Fed. Rep. 39; United States v. Jacobi, No. 15460 Fed. Cas., 1 Flipp. 108.

the persons to be attached; <sup>50</sup> the specific acts of commission or omission which constitute the contempt; <sup>57</sup> when and where committed; <sup>58</sup> that the bankrupt's act was willful; <sup>59</sup> that the order, if any, was lawful, and the date made and by whom; the allowance or grant of an injunction, if any, when and by whom, and that it had been issued on the terms specified and within the limits imposed, and had been duly served in the mode required by it, and by the proper officer. In some cases it is necessary to charge that the acts complained of were done "willfully and contemptuously," and "with full notice and knowledge." <sup>60</sup>

The prayer or request of the petition or motion should be for an order or rule requiring the contemner to appear in court at a certain time and place, and show cause why he should not be attached and punished for contempt.

The facts stated in the petition should be verified by an affidavit, and a motion should be supported by affidavits setting forth the facts.

#### § 681. Notice-Attachment.

An order should not direct a commitment in case of failure to comply with it, without giving the defendant a day in

<sup>56</sup> Creditors v. Cozzens, No. 3378 Fed. Cas., 3 N. B. R. 281; American Construction Co. v. Railroad Co., 52 Fed. Rep. 937.

<sup>57</sup> Toledo C. C. R. Co. v. Penn. Co., 54 Fed. Rep. 747. See also *In re* Swan, 150 U. S. 637, 37 L. Ed. 1207; *In re* Sawyer, 124 U. S. 207, 31 L. Ed. 402.

In United States v. Goldstein, 132 Fed. Rep. 789, 12 Am. B. R. 755, for refusing to answer "sundry questions" put to him during his examination before the referee, was held sufficient, although it did not set out the questions. *In re* Stavrahn (C. C. A. 2d Cir.), 174 Fed. Rep. 330,

98 C. C. A. 202, a petition for contempt for refusing to obey an order to turn over property, need not affirmatively allege that he is able to comply with the order when the record shows that fact.

See United States v. Berry, 24
Fed. Rep. 780; In re Litchfield, 13
Fed. Rep. 868-9.

<sup>59</sup> In re Cole (C. C. A. 1st Cir.), 163 Fed. 180, 90 C. C. A. 50, 20 Am. B, R. 761.

charging In re Sawyer, 124 U. S. 207, 31 L. Ed. 402; Toledo, etc., Ry. Co. v. Penn. Co., 54 Fed. Rep. 751.

court with reference to that part of the order.<sup>61</sup> A copy of the petition or motion and affidavits should generally be served upon the contemner personally.<sup>62</sup>

The referee may of his own motion certify a contempt of court without notice to the accused party, but where the trustee petitions for an order in contempt, the referee should give the accused notice and an opportunity to be heard before him.<sup>63</sup>

The court will ordinarily order a rule to show cause to issue if a prima facie case is made. It is not necessary that the matter alleged as the foundation for the charge appear in the rule to show cause, because the rule is served merely as a basis for process. The rule to show cause should be personally served on the contemner. The attachment to take the body of the contemner is rarely resorted to, for the reason that if he appear on the day specified it is not necessary, and if he does not appear the rule may be made absolute, and if convicted he may be arrested under a warrant or a mittimus. But when there is danger that the contemner will flee from the district, the attachment has been issued immediately upon instituting the proceedings. In one case, at

61 In re Cole (C. C. A. 1st Cir.), 144 Fed. Rep. 392, 16 Am. B. R. 302; In re Davison, 143 Fed. Rep. 673, 16 Am. B. R. 337; In re Hershkowitz, 136 Fed. Rep. 950, 14 Am. B. R. 86; In re Cole (C. C. A. 1st Cir.), 163 Fed. Rep. 180, 90, C. C. A. 50, 20 Am. B. R. 761; In re Stavrahn (C. C. A. 2d Cir.), 174 Fed. 330, 23 Am. B. R. 168, on motion to punish.

62 American Construction Co. v. Railroad Company, 52 Fed. Rep. 938; United States v. Murphy, 44 Fed. Rep. 40; Gray v. Chicago, etc., R. R. Co., No. 5713 Fed. Cas., Woolw. 63. But see Fanshawe v. Tracy, No. 4643 Fed. Cas., 4 Biss. 490.

In Smith v. Belford (C. C. A. 6th Cir.), 106 Fed. Rep. 658, 5 Am. B. R. 291, the want of notice was held error.

63 In re Magen, 179 Fed. 572, 24 Am. B. R. 63.

<sup>64</sup> In re Hooks Smelting Co., 146 Fed. Rep. 336, 15 Am. B. R. 834.

65 This was done in Thomas v. C., N. O. & T. P. R. R. Co., In re Phelan, 62 Fed. Rep. 817, and the person was brought directly to court, and admitted to bail, although this does not appear in the report of the case.

But consult the observation of Judge Drummond, in Fanshawe v. Tracy, No. 4643 Fed. Cas., 4 Biss. 490.

least, a rule has been issued requiring him "to appear in court forthwith to show cause." 66

#### § 682. Answer.

To the rule to show cause, the contemner may make return or answer under oath before the day set for hearing, in which he may deny the allegations of the petition or admit them, or admit them and justify his action.<sup>67</sup>

The denials in the return or answer are not conclusive. 68 At common law the sworn answer was not to be controverted

66 This was done in Toledo, etc., R. Co. v. Penn. Co., 54 Fed. Rep. 751. But see Boyd v. Glucklich (C. C. A. 8th Cir.), 116 Fed. Rep. 131, 8 Am. B. R. 393.

<sup>67</sup> This was done *In re* Swan, 150 U. S. 639, 37 L. Ed. 1207; *In re* Sawyer, 124 U. S. 207, 31 L. Ed. 402; *In re* Ayers, 123 U. S. 456, 31 L. Ed. 216.

In Boyd v. Glucklich (C. C. A. 8th Cir.), 116 Fed. Rep. 131, 8 Am. B. R. 393, the court said: "Dispatch in judicial proceedings is commendable, but, in proceedings involving the liberty of a citizen, he has a right not only to be informed of the precise claim against him, but, after receiving that information, he has a right to a reasonable time to prepare his answer and present his proofs, and, lastly, to be heard by counsel on the law and facts of the case. While proceedings in bankruptcy may be summary, they should not be too summary; in other words, they should not be so summary as to deprive the bankrupt of those fundamental rights and privileges that belong to every citizen, among which are the right to be advised of the demand made upon him, and the right, after being so advised, to have a reasonable time to prepare his defense and produce his witnesses. The Bankrupt Act does not do away with these rights, and no citizen forfeits them by being adjudged a bankrupt." See also *In re* Shachter, 119 Fed. Rep. 1010, 9 Am. B. R. 499; *In re* Hausman (C. C. A. 2d Cir.), 121 Fed. Rep. 984, 10 Am. B. R. 64.

68 High on Injunctions, 1455; United States v. Anonymous, 21 Fed. Rep. 767; Schweer v. Brown (C. C. A. 8th Cir.), 130 Fed. Rep. 328, 12 Am. B. R. 178; In re De Gottardi, 114 Fed. Rep. 328, 7 Am. B. R. 723.

Ripon Knitting Works v. Schreiber, 101 Fed. Rep. 810, 4 Am. B. R. 299, Judge Hanford said: "One of the principal grounds of defense upon which the respondent relies is contained in his answer denying that he has any money. His answer is not conclusive, but the rule in such cases requires that the denial be overcome by evidence proving beyond a reasonable doubt that the bankrupt actually has the present possession or control of money, or that any alleged transfer or other disposition of it is a mere subterfuge which does not prevent him from producing it." See also United as to matters of fact.<sup>69</sup> Mr. Justice Curtis, however, adds to this statement, "there were certain precedents for the introduction of other kinds of proof.<sup>70</sup>

The court may pronounce judgment and make the rule absolute if no answer is filed, or if the answer admits facts which, in the opinion of the court, constitute contempt, or if a justification is deemed insufficient.

#### § 683. Hearing.

The contempt proceedings should be heard before the court and not before the referee.<sup>71</sup> When a sufficient return or answer has been made, the parties appear before the court at the time specified for the hearing. Both parties may present testimony by witnesses examined orally,<sup>73</sup> or by affidavits.<sup>74</sup>

The contemner may appear in person or by counsel, and may file his own affidavit in his own behalf, or with his consent be examined upon written interrogatories.<sup>75</sup> But he can not be compelled to testify against himself. He is not entitled to demand a trial by jury.<sup>76</sup> After the evidence has

States v. Sweeney 95 Fed. Rep. 434; In re Purvine, 2 Am. B. R. 787, 96 Fed. Rep. 192; In re Mayer, 3 Am. B. R. 533, 98 Fed. Rep. 839; In re Gerstel, 123 Fed. Rep. 166, 10 Am. B. R. 411; In re Shachter, 119 Fed. Rep. 1010, 9 Am. B. R. 449.

69 In re Pittman, No. 11184 Fed. Cas., 1 Curtis, 186, per Mr. Justice Curtis; United States v. Dodge, No. 14975 Fed. Cas., 2 Gall. 313; 4 Blackstone's Com. 286-7; In re May, 1 Fed. Rep. 743.

70 In re Pittman. No. 11184 Fed. Cas., 1 Curtis, 186, and cases collated.

71 In re Schulman (C. C. A. 2d Cir.). 177 Fed. Rep. 191, 101 C. C. A. 361, 23 Am. B. R. 809, even under B. A. 1898. Sec. 41a (4).

73 Savin, petitioner, 131 U. S. 267,
279, 33 L. Ed. 150; Cuddy, petitioner, 131 U. S. 281, 33 L. Ed. 154;
Randall v. Brigham, 7 Wall. 540,
19 L. Ed. 285.

74 Mexican Ore Co. v. Mexican Co., 47 Fed. Rep. 353; United States v. Anonymous, 21 Fed. Rep. 767; United States v. Atcheson, etc., R. S. Co., 16 Fed. Rep. 855; United States v. Justices, 10 Fed. Rep. 461.

<sup>76</sup> See Savin, petitioner, 131 U. S.
 279, 33 L. Ed. 150; Cuddy, petitioner, 131 U. S. 281, 33 L. Ed. 154
 <sup>76</sup> Ripon Knitting Works v.
 Schreiber, 101 Fed. Rep. 810, 4 Am.
 B. R. 299. In re Fellerman, 149 Fed.
 Rep. 244, 17 Am. B. R. 785.

See also Tinsley v. Anderson, 171 U. S. 101, 43 L. Ed. 91; Ex parte

been adduced, the court will hear arguments of counsel and determine the facts for itself, or it may refer them to a referee.<sup>77</sup> The question of commitment can not be left to the discretion of the referee.<sup>78</sup>

The bankrupt can not be deprived of a right to a hearing in contempt, so an order to the marshal to arrest him on failure to turn over certain money is erroneous.<sup>79</sup> The contempt must be proved beyond a reasonable doubt.<sup>80</sup>

#### § 684. Judgment.

If the court finds the proofs do not support the charge of contempt, the proper judgment is to dismiss the rule, and if the contemner has been arrested and is in the custody of the marshal or admitted to bail, also to discharge the person. If no cause is shown why he should not be punished for contempt, the court should order the rule to be confirmed and made absolute, and adjudge the person guilty of contempt and fix his punishment. It is good practice for the judgment to recite the offense, but it is not necessary, if it describes the offense charged by reference to other proceedings.<sup>81</sup>

The power of the court to punish contempts of their authority is limited to fine or imprisonment or fine and imprisonment; 82 but there is no limit to the extent of either fine or imprisonment. But it has been held that a bankrupt can not be imprisoned indefinitely, when it is not certainly known that he has property which he has been ordered to sur-

Terry, 128 U. S. 289, 32 L. Ed. 405; Eilenbecker v. Plymouth County, 134 U. S. 31, 33 L. Ed. 801.

<sup>77</sup> In re Herskovitz, 152 Fed. 316, 18 Am. B. R. 247 (to a special master); In re Ruos, 164 Fed. Rep. 749, 21 Am. B. R. 257; In re Lasch, 12 Am. B. R. 158 (referee).

<sup>78</sup> Smith v. Belford (C. C. A. 6th Cir.), 106 Fed. Rep. 658, 5 Am. B. R. 291,

<sup>79</sup> *In re* Baum (C. C. A. 8th Cir.), 169 Fed. Rep. 410, 94 C. C. A. 632, 22 Am. B. R. 295.

80 Moody v. Cole, 148 Fed. 295,
 17 Am. B. R. 818; Matter of Jacob Cashman, 168 Fed. Rep. 1008, 21
 Am. B. R. 284.

<sup>81</sup> Fischer v. Hayes, 6 Fed. Rep. 70; Loveland's Forms Fed. Prac., Nos. 718-729.

82 B. A. 1898, Sec. 2, clause 13.

render.<sup>83</sup> A court can not disbar an attorney for contempt.<sup>84</sup> It can not punish contempt committed in any other court.<sup>85</sup> When a fine is imposed as punishment, the contemner may be ordered to stand committed until the fine and cost be paid,<sup>86</sup> and such an order is not in conflict with statutes prohibiting imprisonment for debt.<sup>87</sup>

When the judgment of the court be imprisonment or fine and commitment until paid, a warrant or mittimus is issued. It recites that the contemner has been convicted of a contempt of court, and should specify particularly where and how long the contemner is to be imprisoned, and what he is to do to entitle him to discharge. Thus it may command the marshal to take the body of the contemner and keep\_him in custody until he shall have paid into court the amount of the fine, together with the fees of the marshal thereon, so or it may specify a particular place and term of imprisonment, and command the marshal to take the body of the person and commit the same to such place of confinement. The court may require petitioning creditors to pay the expenses of a receivership upon dismissing the petition, or in case of failure to produce books of account when ordered.

## § 685. Release by the court.

The rule with reference to the power of the court committing a contemner to release him by a subsequent order seems to be, that in case of a criminal contempt, being an

88 In re Taylor, 114 Fed. Rep. 607,7 Am. B. R. 410.

84 Ex parte Robinson, 19 Wall.513, 22 L. Ed. 205.

85 Ex parte Bradley, 7 Wall. 372,19 L. Ed. 214.

86 See In re Tyler, 149 U. S. 164, 180, 37 L. Ed. 689.

87 Bogart v. Supply Co., 27 Fed.
Rep. 722; Jeffries v. Laurie, 27 Fed.
Rep. 198; Fischer v. Hayes, 6 Fed.
Rep. 63; Ripon Knitting Works v.

Schreiber, 101 Fed. Rep. 810, 4 Am. B. R. 299.

<sup>88</sup> Fischer v. Hayes, 7 Fed. Rep. 98. For form of mittimus, see Loveland's Forms Fed. Prac., Nos. 730, 731.

<sup>89</sup> Loveland's Forms Fed. Prac., No. 731.

90 In re Lacov (C. C. A. 2d Cir.),142 Fed. Rep. 960, 15 Am. B. R.290.

<sup>91</sup> In re Wilson, 116 Fed. Rep.419, 8 Am. B. R. 612.

offense against the United States, and the commitment but an execution of the judgment of conviction, the court has no power to discharge or remit the sentence.<sup>92</sup> But it falls within the pardoning power of the president by the constitution.<sup>93</sup> Where the proceeding is of a civil nature, the court has power to release the person.<sup>94</sup>

Where a person has been imprisoned for contempt, relief is usually sought by habeas corpus. 95 The person may be discharged if the order of commitment was utterly void, 96 otherwise not. 97 The inquiry can not be extended under a writ of habeas corpus so as to review, as upon writ of error, any irregularity of the proceedings in the court of bankruptcy, or to determine, as upon appeal, the real merits of the case. 98

# § 686. Review of orders of commitment for contempt.

An order of commitment for contempt, made in a "bank-ruptcy proceeding proper," is reviewable on petition for revision.¹ A petition for revision will not lie to review an order of commitment for contempt in a "controversy arising in bank-ruptcy." ²

<sup>92</sup> In re Mullee, No. 9911 Fed. Cas., 7 Blatch, 23.

93 Dixon's Case, 3 Atty. Gen. Op.
622; Rowan's Case, 4 Atty. Gen.
Op. 458; Conger's Case, 4 Atty.
Gen. Op. 317.

<sup>94</sup> Hendryx v. Fitzpatrick, 19 Fed. Rep. 810; In re Henderson, 13 Am. B. R. 782.

In re Taylor, 114 Fed. Rep. 607, 7 Am. B. R. 410, the court discharged the prisoner on the ground that it was useless to keep him imprisoned in order to recover money claimed to be in his possession.

95 In re Watts and Sachs, 190 U.
S. 1, 47 L. Ed. 933, 10 Am. B. R.
113; In re Freche, 109 Fed. Rep.
620, 6 Am. B. R. 479; In re Claiborne, 109 Fed. Rep. 74, 5 Am. B.
R. 812.

98 Ex parte Terry, 128 U. S. 289,
32 L. Ed. 405; Ex parte Fisk, 113
U. S. 713, 28 L. Ed. 1117.

97 In re Tyler, 149 U. S. 164 180, 37 L. Ed. 689; Savin, petitioner, 131 U. S. 267, 33 L. Ed. 150; Cuddy, petitioner, 131 U. S. 280, 286, 33 L. Ed. 154; Ex parte Kearney, 7 Wheat, 38, 5 L. Ed. 391; In re Eaton, 51 Fed. Rep. 804.

98 Ex parte O'Neal, 125 Fed. Rep. 967, 11 Am. B. R. 196.

<sup>1</sup> Mueller v. Nugent, 184 U. S. 1, 46 L. Ed. 405, 5 Am. B. R. 176; In re Cole (C. C. A. 1st Cir.), 144 Fed. Rep. 392, 75 C. C. A. 330, 16 Am. B. R. 302, and 163 Fed. 180, 90 C. C. A. 50, 20 Am. B. R. 761; In re Lans (C. C. A. 2d Cir.), 158 Fed. Rep. 610, 19 Am. B. R. 458.

<sup>2</sup> Morehouse v. Pacific Hdwe. & Steel Co. (C. C. A. 9th Cir.), 177

An order of commitment for contempt, made in a controversy arising in bankruptcy, or a suit growing out of the settlement of a bankrupt estate, is governed by the rules regulating the review of orders of this kind generally.

A judgment for a criminal contempt committed in the progress of a suit in equity growing out of bankruptcy proceedings is reviewable by writ of error only and may be reviewed before final decree in the original case.<sup>3</sup>

A judgment against a party to a suit in equity, growing out of the settlement of a bankrupt estate, for a civil contempt committed therein before final decree is reviewable by appeal from the final decree only.<sup>4</sup>

Fed. Rep. 337, 100 C. C. A. 647, 24 Am. B. R. 178.

<sup>3</sup> Clay v. Waters (C. C. A. 8th Cir.), 178 Fed. Rep. 385, 101 C. C. A. 645, 24 Am. B. R. 293; Bessette v. Conkey Co., 194 U. S. 324, 48 L. Ed. 997.

<sup>4</sup> Clay v. Waters (C. C. A. 8th Cir.), 178 Fed. Rep. 385, 101 C. C. A. 645, 24 Am. B. R. 293; Doyle v. London Guaranty Co., 204 U. S. 599, 51 L. Ed. 641.

#### CHAPTER XXXV.

#### COMPOSITIONS AND ARBITRATIONS.

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#### § 687. The general nature of a composition.

The theory of a composition is that the cash value of the bankrupt's estate is substantially divided among the creditors in proportion to their respective debts.

The bankrupt presents a list of the names of his creditors and the amount due each of them, the amount of his assets and the rate per centum he is willing to pay on these debts as a compromise, in consideration of his discharge from the balance due each creditor. His creditors consider the subject, thus presented, after the debtor has filed his schedules and has been examined under oath. The whole matter being thus before them, they resolve that their interests require that a compromise shall be made, and that, if the debtor will pay them a certain percentage of their debts, they will accept it in satisfaction and he shall be discharged. They deliberately resolve, upon an understanding of all the facts, that this is all that his property can be made to pay.

<sup>&</sup>lt;sup>1</sup> B. A. 1898, Sec. 12a, as amended at L. 838. Compare R. S. Sec. 5103, by the act of June 25, 1910, 36 Stat. act 1867.

Some one must decide the question of the amount of the dividend and of the discharge. Some one must say that the debt of an opposing creditor shall be discharged without payment in full. Congress has provided that the debtor and a majority of his creditors, in number and amount, may determine these questions if they can agree upon a compromise. The minority of the creditors must submit to the terms agreed upon by the majority. The terms of the compromise are subject to be approved or disapproved by the judge. The rights of those who are not called upon or who dissent may be fully protected by objections properly taken and presented to the judge at the time of the application for an order confirming the composition. The property is distributed under the direction of the court.

This is a much shorter and less expensive method of settling the bankrupt's estate than if the whole machinery of the court, in a full bankruptcy proceeding, is called into use. Where the bankrupt and a majority of his creditors fail to agree upon terms of compromise, or where the court refuses to approve the terms agreed upon, the estate is administered in bankruptcy as otherwise provided by the statute.

# § 688. The power of Congress to provide for compositions.

Provisions for facilitating arrangements between bankrupts and their creditors by composition were first introduced in the United States by an amendment to the act of 1867, passed June 22, 1874.<sup>2</sup> The bankrupt acts of 1800, 1841 and the original act of 1867 contained no provisions for a composition by a bankrupt with his creditors.

As soon as the amendment of 1874 was passed, it was attacked upon the ground that Congress had exceeded its power and was not authorized by the Constitution to provide for a composition by a bankrupt with his creditors for less than the full amount of his debts. The question came before

218 Stat. at L. 182, Sec. 17. The provision of this amendment, relating to compositions, is set out in

parallel columns with the English act of 1868. In re Scott, No. 12519 Fed. Cas., 15 N. B. R. 73.

Mr. Justice Hunt, who sustained the validity of the provision in the amendment of 1874.<sup>3</sup> Upon principle, as well as authority, the present provision for a composition can not be successfully attacked on the ground of being in contravention of the Constitution of the United States.<sup>4</sup>

# § 689. Composition provisions should not be construed broadly.

It has been said 5 that "the composition clause of the law should receive a strict construction, because it is in plain derogation of common right. It compels the dissenting minority of creditors to accept just as much upon their claims as the debtor and the requisite majority see fit to resolve that all shall accept. It takes from the minority the common right of making their own terms with their debtor, and releases the obligation of the latter to them against their will, and upon terms imposed by the majority. Certainly, therefore the provisions of this clause should not be extended by construction to embrace more than the words clearly and manifestly import." If the proceedings are not had in accordance with the provisions the court can not confirm a composition.6 Proceedings such as these under Section 12, B. A. 1898, are to a large extent based on business principles and should not be hampered by undue technicalities.7

# § 690. When a bankrupt may offer terms of composition.

A bankrupt may offer, either before or after an adjudication, terms of composition to his creditors after, but not before, he has been examined in open court or at a meeting of his cred-

<sup>8</sup> In re Reiman, No. 11675 Fed. Cas., 12 Blatch. 562; In re Chamberlin, No. 2580 Fed. Cas., 9 Ben. 149.

\* As to the extent of the power of Congress to pass bankrupt laws generally, consult Chap. 9.

<sup>5</sup> In re Shields, No. 12784 Fed. Cas., 4 Dill. 588; In re Frear, 120 Fed. Rep. 978, 10 Am. B. R. 109; In re Rider, 90 Fed. Rep. 808, 3

Am. B. R. 178; In rè Rung Bros., 2 Am. B. R. 620, it was held that where at the first meeting of creditors a composition was offered by the debtors that the election of a trustee may be postponed.

<sup>6</sup> In re Frear, 120 Fed. Rep. 978, 10 Am. B. R. 199.

<sup>7</sup> In re Criterion Watch Case Co., 8 Am. B. R. 2a, at 209.

itors and filed in court the schedule of his property and list of his creditors, required to be filed by bankrupts.8

The statute does not limit the right to offer terms of composition to any particular class of bankrupts. Any bankrupt is entitled to offer terms of compromise to his creditors. The right extends to corporations <sup>9</sup> and to partnerships. <sup>10</sup> Any member of a partnership, which has been adjudged bankrupt, may submit a proposition of composition to the creditors of the firm and to his individual creditors. <sup>11</sup>

It will be observed that there is a limitation in respect to the time at which such an offer may be made. A bankrupt is not entitled to make such an offer before he has been examined in open court or at a meeting of his creditors, and filed in court a schedule of his property and a list of his creditors. Such an offer may be made at any time after he has complied with these conditions.

Prior to the amendment of 1910, it was held that a composition could not be affected until after an adjudication and an examination of the bankrupt at the first meeting of creditors. This rule was changed by that amendment which provided expressly for offering terms of composition before an adjudication and postponing the adjudication in case a composition was offered before it had been made. This change makes it possible for debtors to compose with their creditors before an adjudication without the stigma of being adjudicated bankrupt. Its object is to encourage settlement between debtors and creditors under the supervision of the court.

<sup>&</sup>lt;sup>8</sup> B. A. 1898, Sec. 12a, as amended by the act of June 25, 1910, 36 Stat. at L. 838.

<sup>&</sup>lt;sup>9</sup> In re Weber Furniture Co., No. 17330 Fed. Cas., 13 N. B. R. 529.

Pool v. McDonald, No. 11268
 Fed. Cas., 15 N. B. R. 560; In re
 Spades, No. 13196
 Fed. Cas., 6
 Biss. 448.

<sup>&</sup>lt;sup>11</sup> Pool v. McDonald, No. 11268 Fed. Cas., 15 N. B. R. 560.

<sup>&</sup>lt;sup>12</sup> In re Back Bay Automobile Co.,
158 Fed. Rep. 679, 19 Am. B. R. 835;
In re Rider, 96 Fed. Rep. 808, 3 Am.
B. R. 178; In re Frear, 120 Fed.
Rep. 978, 10 Am. B. R. 199; In re
Hilborn, 104 Fed. Rep. 866, 4 Am.
B. R. 741.

<sup>&</sup>lt;sup>18</sup> B. A. 1898, Sec. 12, as amended by the act of June 25, 1910, 36 Stat. at L. 838.

The debtor will not ordinarily be permitted to make a second application for confirmation in case the first one is denied. Where the court refused to permit a composition on the ground that the offer was not sufficiently large, the debtor was permitted in one case to make a better offer and a second application for confirmation, which was granted. He was not permitted to make the second application in that case until he had shown good reason for not having previously made a better offer.

Under the act of 1867 it was held that a refusal to grant a discharge was not an estoppel to proceedings in composition.<sup>17</sup>

This is not the rule under the present statute. Section 12d of the act provides that "the judge shall confirm a composition if satisfied that . . . the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which shall be a bar to a discharge." What was sufficient to bar a discharge will prevent the confirmation of a composition. The denial of a discharge is a bar to an application to confirm a composition.

## § 691. Creditors' meeting to consider terms of composition.

Whenever a bankrupt is satisfied that a sufficient number of creditors will accept his offer of terms of composition he may apply to the court for a meeting of the creditors to consider the proposition for composition.

The application is made by petition.<sup>18</sup> The petition should be entitled in the court and cause, and state the *per centum* which the bankrupt offers to pay, and that he believes it will be accepted by a majority in number and in value of the creditors whose claims are allowed, and pray that a meeting of the creditors may be duly called to act upon such proposal for a composition. The petition should be signed by the bankrupt.

 <sup>&</sup>lt;sup>16</sup> In re Whipple, No. 17513 Fed.
 Cas., 11 N. B. R. 524.
 <sup>17</sup> In re Odell, No. 10427 Fed.
 Cas., 9 Ben. 247; In re Joseph, 24
 Fed. Rep. 137.

<sup>&</sup>lt;sup>18</sup> Official Form No. 60; see Form No. 107, post.

This petition may be presented to the judge or to the referee. Upon such a petition an order is regularly passed directing a meeting of the creditors to be called. Thereupon the referee should give the creditors at least ten days' notice by mail of the time and place of holding the meeting. At this meeting the proposal for a composition is voted upon by the creditors. All unsecured creditors and secured creditors, to the extent of the balance of their debts after having deducted the amount of their securities, which have been proved and allowed, are entitled to vote. 20

In the case of an offer of compromise by a partnership or one of the partners, both the firm and individual debtors may vote.<sup>21</sup> The state of the respective debts and funds may be such as to justify this course, and where they are so, it simplifies the proceeding very materially. But if one of any class of the creditors perceives that the other class is about to force upon him an unjust composition he can demand a separate vote and so protect himself by calling to his assistance those who compose the class to which he belongs.<sup>22</sup> The partnership creditors can not by outvoting the individual creditors obtain the approval of a composition of individual debts and assets unsatisfactory to the individual creditors. The firm creditors are really not interested in the individual assets, and will not be counted on the question of approving an individual composition.<sup>23</sup>

The creditors are required to pass the resolution for a composition by a majority vote in number and amount of the claims allowed.<sup>24</sup> The court in composition has no right to

<sup>19</sup> B. A. 1898, Sec. 58a. But see In re Frear, 120 Fed. Rep. 978, 10 Am. B. R. 199; In re Simon Fox, 6 Am. B. R. 525, at 529, it was said, obiter, that it was possible for notices of an offer of a composition to go to all creditors along with the first meeting notices.

<sup>20</sup> B. A. 1898; see 56 (a); In re Kahn, 121 Fed. Rep. 418, 9 Am. B. R. 107. <sup>21</sup> Pool v. McDonald, No. 11268 Fed. Cas., 15 N. B. R. 560; *In re* Spades, No. 13196 Fed. Cas., 6 Biss. 448.

<sup>22</sup> In re Spades, No. 13196 Fed.Cas., 6 Biss. 448.

<sup>23</sup> In re Ullman, 180 Fed. Rep. 944, 24 Am. B. R. 755.

<sup>24</sup> B. A. 1898, Sec. 56a.

In In re Rider, 96 Fed. Rep. 808, 3 Am. B. R. 178, Judge Coxe said:

recognize any creditor or claim not filed within the time limited by Section 57.25 The resolution must be reduced to writing and should be signed by the creditors, who accept the terms offered, together with the amount of each claim proved and allowed.26

A bankrupt has a standing in composition proceedings to oppose the allowance of claims, whether or not he has scheduled them in his petition.<sup>27</sup>

If a sufficient number of creditors do not attend this meeting, the bankrupt may circulate the resolution among his creditors, who have proved claims, and thus secure a majority in number of all the creditors whose claims have been allowed, which number represents a majority in the amount of such claims. The statute requires the acceptance to be in writing. It is not necessarily obtained at a meeting of creditors.<sup>28</sup> Creditors having once accepted a composition of-

"After the bankrupt has been examined and filed a list of his creditors he 'may offer terms of composition to his creditors.' This plainly implies that the offer should be made to all his creditors, whether they have proved their debts or not. It is not essential that proofs shall be made before, or at the first meeting. They may be made at any time within a year. . . . After the terms are thus made known to all the creditors they have a reasonable time to decide whether they will accept the offer or not. But in order to qualify themselves to vote upon the proposition they are required to prove their claims. The reason for this is obvious; it excludes from the voting all but bona fide creditors; it excludes all those who are too indifferent to present their claims and all whose claims are unliquidated, tictitious or exorbitant; it gives all creditors notice, no matter what may be the nature of their claims, and permits them to qualify, if they desire to do so, and assent to the compromise or oppose it, or if they so elect, they may simply withhold their assent." To the same effect is *In re* Simon Fox, 6 Am. B. R. 525.

See also *In re* Frear, 120 Fed. Rep. 978, 10 Am. B. R. 199; *In re* Hilborn, 104 Fed. Rep. 866, 4 Am. B. R. 741.

25 In re French, 181 Fed. Rep.
 583, 24 Am. B. R. 77.

<sup>26</sup> In re Frear, 120 Fed. Rep. 978,
 10 Am. B. R. 199.

<sup>27</sup> In re French, 181 Fed. Rep. 583, 24 Am. B. R. 77.

<sup>28</sup> Consult *In re* Spillman, No.
 13242 Fed. Cas., 13 N. B. R. 214; *In re* Scott, No. 12519 Fed. Cas., 15 N. B. R. 73.

As to adjourning the meeting when the best interests of the creditors require it, see *In re* Cheney, No. 2637 Fed. Cas., 19 N. B. R. 16.

fered will not be permitted to withdraw their consent, in the absence of fraud or misrepresentations.<sup>29</sup>

# § 692. Requisites before applying for a confirmation.

The court is expressly authorized to confirm or reject composition between debtors and their creditors.<sup>30</sup> The bankrupt must apply to the judge and not to the referee for the order confirming the composition.<sup>31</sup>

Before such an application can be made the bankrupt is required to do three things.

First. He must file an acceptance of his offer of compromise in writing by majority in number of all creditors whose claims have been allowed, which must represent a majority in amount of such claims.<sup>32</sup> The manner of obtaining the consent of his creditors is considered in the last section and need not be repeated.

Second. He must deposit the consideration to be paid by the bankrupt to his creditors in such a place as may be designated by the judge, and the same must be subject to the order of the judge.<sup>32</sup>

Third. He must also deposit the money necessary to pay all debts which have priority, and the costs of the proceedings, in such place as may be designated by the judge, and the same must be subject to the order of the judge.<sup>32</sup>

A question may arise as to the right of a bankrupt offering a composition to give a lien on his assets to the party furnishing the requisite funds. It has been held that under

<sup>29</sup> In re Levy, 110 Fed. Rep. 744, 6 Am. B. R. 299. See also In re Seligman, 163 Fed. Rep. 549, 20 Am. B. R. 774, where the change of such creditor did not prevent a confirmation, although the court did not lay down this broad rule.

30B. A. 1898, Sec. 2, clause 9;
 Gen. Ord. 12. In re Hilborn, 104
 Fed. Rep. 866, 4 Am. B. R. 741.

 $^{31}$  B. A. 1898, Sec. 12a as amended by the act of June 25, 1911, 36 Stat: at L. 838.

<sup>32</sup> B. A. 1898, Sec. 12b; In re Frear, 120 Fed. Rep. 978, 10 Am. B.
R. 199, 120 Fed. Rep. 978; In re Flynn, 134 Fed. Rep. 145, 13 Am. B.
R. 720; In re Fisher & Co., 135 Fed.
Rep. 223, 14 Am. B. R. 366.

In re Harvey, 144 Fed. Rep. 991, 16 Am. B. R. 345, Judge Holland said: "The conclusions are: (1) A bankrupt in a composition proceeding is required to deposit, for

this guise a creditor can not exact payment, directly or indirectly, of existing debts, although further sums were then advanced,33 and by the same token security for such debts could not be given. Further than this the assets of the bankrupt are already subject to the prior charge of the bankruptcy proceeding, and are no longer in the bankrupt's hands. However, it is believed that the giving of security to one who supplies the bankrupt with funds is not illegal. Under the act the giving of security for a present advance is not objectionable.84 In the case under consideration the promise by the bankrupt to the lender to give him a first or other lien on the assets if the composition is confirmed would create a present equitable lien on the assets. would protect the lender and cause no hardship on any creditor. But the equitable lien would take precedence over all but prior liens in case the confirmation were set aside or subsequent bankruptcy intervened.

If the bankrupt fails to do any of these things before applying for an order of confirmation his application should be disregarded.

# § 693. Deposit for consideration and expenses.

The consideration should be substantially equivalent to the cash value of the bankrupt's estate, that is, what his estate would pay in bankruptcy. Otherwise the object of a composition is evaded.

The theory of a composition is that the cash value of the bankrupt's estate is substantially divided among the creditors

the purpose of carrying out the composition, sufficient to cover costs, priority claims and expenses, and, in addition, the percentage named, not only on all claims filed before confirmation, but also on all other claims listed by the bankrupt in his schedule; (2) this will include, of course, scheduled claims filed after the composition agreement had been accepted and sufficient will be required to cover the

same percentage upon them; (3) the bankrupt is not required to deposit sufficient to secure a percentage on secured claims, nor for any supposed deficiency, if it has not yet been ascertained and filed." See also *In re* Simon Fox, 6 Am. B. R. 525.

83 McCormick v. Solinsky, 152Fed. Rep. 984, 18 Am. B. R. 540.

34 B. A. 1898, Sec. 67 (d).

in proportion to their respective debts. It is established by all experience that a man can make more out of his own assets than a trustee of more general capacity than he, and entirely honest, can possibly realize. There may be a margin in many cases which the debtor may save by offering less than he might offer, and more than his creditors could obtain by process of law.<sup>35</sup>

The statute does not declare of what the consideration must consist. Manifestly it should be of such a nature that it can be readily distributed by the judge. The most convenient form of consideration is money. But an honest debtor has no money. He has paid in all his money as well as his other property as a part of his estate. If he is required to deposit a money consideration in all cases, few compositions could be effected. In such cases he is usually dependent upon his friends.<sup>36</sup>

A practical consideration consists in promises to pay money at specified dates, secured by notes, reorganization bonds, or other negotiable paper,<sup>87</sup> or possibly stock in a new company.<sup>38</sup> Creditors who have confidence in their debtor may be willing, and may consider it for their own best interests to accept a paper consideration and permit the bankrupt to continue his business. That negotiable paper may be used

<sup>35</sup> In re Criterion Watch Case Co.. 8 Am. B. R. 206 at 212; Exparte Jewett, No. 7302 Fed. Cas., 2 Low. 393; In re Whipple, No. 17513 Fed. Cas., 11 N. B. R. 524; În re Weber Furniture Co., No. 17330 Fed. Cas., 13 N. B. R. 529.

<sup>86</sup> In re C. H. Bennett Shoe Co., 162 Fed. Rep. 691, 20 Am. B. R. 704, the district court refused to disturb a finding by the referee that a note of the bankrupt to one who furnished the money given shortly after a confirmation of a composition in a prior bankruptcy proceeding, was not without consideration. The court said: "The corporation

could borrow money to enable it to settle an offer of composition made to and accepted by its creditors."

<sup>37</sup> Consult *In re* Langdon, No. 8058 Fed. Cas., 2 Low. 387; *În re* Reiman, No. 11673 Fed. Cas., 7 Ben. 455, affirmed in No. 11675 Fed. Cas., 12 Blatch. 562; *In re* Lewis, No. 8314 Fed. Cas., 14 N. B. R. 144; *In re* Hurst, No. 6925 Fed. Cas., 1 Flipp. 162; *In re* Wronkow, No. 18105 Fed. Cas., 15 Blatch. 38.

<sup>38</sup> In re Woodend, 133 Fed. Rep. 593, 12 Am. B. R. 768, this was denied because of the character and value of the stock.

is implied by Section 14c of the act, which provides that "the confirmation shall discharge the bankrupt from his debts other than those agreed to be paid by the confirmation of the composition." It is significant that the word "consideration" is used, and in the next clause relating to debts having priority and the cost of the proceedings the word "money" is used, as if Congress intended to make a distinction in the character of the two deposits.

It will be observed that money only can be deposited for the purpose of paying debts which have priority and the cost of the proceeding.<sup>39</sup> A sufficient sum to pay the debts which have priority and the costs of the proceeding must be deposited. This is one of the conditions precedent to obtaining a confirmation of the composition.<sup>40</sup> The rule seems to have been otherwise under the act of 1867.<sup>41</sup>

The amount of money to be deposited depends on the amount of the indebtedness of the estate. The indebtedness of the estate is ascertained from the schedule and the proofs of claims filed.<sup>42</sup> The amount named in the proofs controls that named in the schedule after the confirmation. The bankrupt must pay his own attorney,<sup>42\*</sup> and the deposit must be sufficient to pay taxes due and unpaid.<sup>43</sup>

# § 694. Application to confirm.

When the bankrupt has complied with the conditions mentioned above, he may apply for a confirmation of the composition.

The application is made by petition addressed to the judge. 44
It should state that the bankrupt has been examined in open

<sup>89</sup> B. A. 1898, Sec. 12b.

<sup>40</sup> In re Harris, 117 Fed. Rep. 575; 9 Am. B. R. 20; In re Simon Fox, 6 Am. B. R. 525; In re Cooper Bros., 166 Fed. Rep. 932, 20 Am. B. R. 634.

<sup>41</sup> In re Chamberlin, No. 2580 Fed. Cas., 9 Ben, 149.

42 In re Harvey, 144 Fed. Rep.

901, 16 Am. B. R. 345; In re Simon Fox, 6 Am. B. R. 525.

42\* In re Martin, 152 Fed. Rep. 582, 18 Am. B. R. 250.

<sup>43</sup> In re Flynn, 134 Fed. Rep. 145, 13 Am. B. R. 720.

44 General Ord. 12. Official Form No. 61; see Form No. 111, post; B. A. 1898, Sec. 38, clause 4. court or at a meeting of his creditors; that he has filed in court a schedule of his property and list of his creditors; that he has offered terms of composition to his creditors, which have been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number represents a majority in the amount of such claims; and that the consideration to be paid by the bankrupt to his creditors, the money necessary to pay all debts, the costs of the proceedings, and the amount thereof, have been deposited subject to the order of the judge, in a certain depository, naming it, and conclude with a prayer that the court confirm the said composition. The petition is signed by the bankrupt without verification.

The judge fixes a date and place, with reference to the convenience of the parties in interest, for the hearing of such application for the confirmation of the composition. The creditors are entitled to have at least ten days' notice by mail of such hearing. This notice may be served by the referee or by the clerk as the judge may direct. The notice is usually in the form of an order to show cause why the composition should not be confirmed.

# § 695. Objections to a confirmation.

General creditors are entitled to object to a confirmation of a composition, but secured creditors are not entitled to object. They have no interest in the general fund. The assignee of a claim has the same right to object as his assignor. The creditor's motive for objecting is immaterial.<sup>46</sup>

A trustee is not authorized to interfere in such proceeding beyond furnishing such information concerning the estate under his charge and the administration thereof as may be requested. He can not object to a confirmation.<sup>47</sup>

7th Cir.), 133 Fed. Rep. 338, 13 Am. B. R. 193, 196; In re Cohen, 149 Fed. Rep. 908, 18 Am. B. R. 84, the court commented on the fact that the trustee favored the composition offered.

<sup>&</sup>lt;sup>45</sup> B. A. 1898, Sec. 58a.

<sup>&</sup>lt;sup>46</sup> In re Comstock, 156 Fed. Rep. 747, 19 Am. B. R. 65.

<sup>&</sup>lt;sup>47</sup> Ross v. Saunders (C. C. A. 1st Cir.), 105 Fed. Rep. 915, 5 Am. B. R. 350; *In re* Wrisley Co. (C. C. A.

If the creditors interested in composition proceedings fail to attend to their interest in time, the courts will not relieve them from the consequences of their neglect, except they made a clear case for equitable interference in their behalf.<sup>48</sup> The court, without any objection before it, of its own motion may inquire into the regularity of the offer of composition.<sup>49</sup>

When a creditor desires to oppose the application of a bankrupt for the confirmation of a composition he must enter his appearance in opposition thereto on the day when the creditors are required to show cause, and must file a specification in writing of the grounds of his opposition within ten days thereafter, unless the time shall be enlarged by special order of the judge. The form of the specification in opposition to a confirmation is substantially the same as in opposition to a discharge. The form of the specification in opposition to a discharge.

There are three general grounds for opposing the confirmation of a composition by a bankrupt by his creditors. They are: $^{52}$ 

*First.* That the composition is not for the best interests of the creditors.

Second. That the bankrupt has been guilty of an act or failed to perform some of the duties which would be a bar to his discharge and

Third. That the composition has been procured by fraud.

<sup>48</sup> In re Abrams & Rubins, 173 Fed. Rep. 430, 23 Am. B. R. 25; In re Rudwick, 93 Fed. Rep. 787, 2 Am. B. R. 114.

In re Wronkow, No. 18105 Fed. Cas., 15 Blatch. 38, the objecting creditor did not attend the meeting called to consider the proposal for composition.

49 In re Frear, 120 Fed. Rep. 978,
 10 Am. B. R. 199; Adler v. Jones

(C. C. A. 6th Cir.), 109 Fed. Rep. 967, 6 Am. B. R. 245, 248.

50 General Ord. 32.

51 Official Form No. 58; see Form No. 157, post; City National Bank of Dallas v. Doolittle (C. C. A. 5th Cir.), 107 Fed. Rep. 236, 5 Am. B. R. 736; Adler v. Jones (C. C. A. 6th Cir.), 109 Fed. Rep. 967, 6 Am. B. R. 245; Riley v. Pope, 186 Fed. Rep. 857, 26 Am. B. R. 618.

<sup>52</sup> B. A. 1898, Sec. 12d.

#### § 696. Because not for the interest of the creditors.

The first ground of opposition to a confirmation is thatit is not for the interest of the creditors.<sup>53</sup> The interest tobe considered is that of all the general creditors and not any particular creditor or class of creditors. It is the creditors who have proved their claims at the time the matters are being considered.

The statute evidently imposes upon the judge the duty of examining the offer and acceptance and ascertaining whether the composition is for the best interests of the creditors. The question is, not whether the debtor might have offered more, but whether his estate would pay more in bankruptcy.<sup>54</sup> In determining this question the court should consider the amount of debts, the amount and character of the assets, the nature of the business that is to be carried on, and many other circumstances.<sup>55</sup>

If the court is satisfied upon the hearing that the composition offered would pay creditors very considerably less than they might reasonably be expected to realize in the administration of the assets in due course, then the composition is not for the best interest of creditors. In determining this question the courts will doubtless be influenced by the consideration that a man can ordinarily do better with his own property, and realize more therefrom, than can be obtained in course of judicial proceedings with compulsory sales and expense of administration. In England the determination of the creditors is final, in the absence of fraud, and it has been said that <sup>57</sup> "it will be found that the practical administration of our law must be very similar."

<sup>53</sup> B. A. 1898, Sec. 12d.

<sup>54</sup> Ex parte Jewett, No. 7303 Fed. Cas., 2 Low. 393; In re Whipple, No. 17513 Fed. Cas., 2 Low. 404; In re Weber Furniture Co., No. 17330 Fed. Cas., 13 N. B. R. 529, reversed on appeal, No. 17331 Fed. Cas., 13 N. B. R. 559; In re Reiman, No. 11673 Fed. Cas., 7 Ben. 455, on appeal, No. 11675 Fed. Cas., 12 Blatch. 562.

 <sup>55</sup> So done in Criterion Watch
 Case Co., 8 Am. B. R. 206; Riley v.
 Pope, 186 Fed. Rep. 857, 26 Am.
 B. R. 618.

<sup>&</sup>lt;sup>66</sup> Adler v. Jones (C. C. A. 6th.
Cir.), 109 Fed. Rep. 967, 6 Am. B.
R. 245; *In re* Arrington Co., 8 Am.
B. R. 64, 113 Fed. Rep. 498.

<sup>&</sup>lt;sup>57</sup> Ex parte Jewett, No. 7303 Fed. Cas., 2 Low. 393, and quoted with approval in *In re* Weber, No. 17331 Fed Cas., 13 N. B. R. 559.

The fact that a majority of the creditors have consented to the terms offered by the bankrupt, is *prima facie* evidence that it is for the best interest of all, and the burden of proof <sup>58</sup> is then upon the dissenting creditors to show cause for not confirming the composition. <sup>59</sup>

How far Congress intended to protect creditors against each other, and how far the court is to inquire into motives, are questions of no little difficulty. The law which enables a majority of creditors to accept a composition with their debtor, to which other creditors do not consent, and so to bind such dissentients, assumes as an essential condition that it shall in all respects be just. Some creditors may agree to the composition without much inquiry, upon the ground that bankruptcy is to be avoided at all risks; some out of kindness to the bankrupt; some from a conviction that the

58 In re Waynesboro Drug Co., ,157 Fed. Rep. 101, 19 Am. B. R. 487; In re Cohen, 149 Fed. Rep. 908, 18 Am. B. R. 84; In re Hoxie, 180 Fed. Rep. 508, 25 Am. B. R. 32. <sup>59</sup> In re Hoxie, 180 Fed. Rep., 508, 25 Am. B. R. 32; In re Waynesboro Drug Co., 157 Fed. Rep. 101, 19 Am. B. R. 487, citing the text; Adler v. Jones (C. C. A. 6th Cir.), 109 Fed. Rep. 967, 6 Am. B. R. 245; In re Arrington Co., 113 Fed. Rep. 498, 8 Am, B. R. 64, 86 out of 89 creditors accepted the terms of composition, and only one objected. In re Seligman, 163 Fed. Rep. 549, 20 Am. B. R. 774. Here the court said: "The condition of the estate indicates that probably not more than 30 per cent, could be realized if no further expenses were involved, and the bankrupt has deposited funds sufficient to cover a payment of 25 per cent. net." Only one creditor, representing 10 per cent. of the debts, objected, and he had formerly consented. The composition offered of 25 per cent. was confirmed. In re Criterion Watch Case Co., 8 Am. B. R. 206, 51 out of 62 creditors accepted the terms of the composition and only two objected. In re Weber Furniture Co., No. 17330 Fed. Cas., 2 Low. 404, reversed on appeal on the ground that the composition was prima facie evidence which was not rebutted by the evidence, No. 17331 Fed. Cas., 13 N. B. R. 559. As to the weight to be given an acceptance by the requisite majority of creditors who are acquainted with all the facts, see also In re Greenebaum, No. 5769 Fed. Cas., 1 Chi. Law Jour. 599; In re Waynesboro Drug Co., supra, the court analyzed the inventory of assets and concluded that the assets would not bring the inventoried price, and confirmed a composition offer of 30 per cent. In re Martin, 152 Fed. Rep. 582, 18 Am. B. R. 250, between 50 and 60 per cent. of the creditors by amount and 90 per cent. by number consented, and one of the two

offer is for their own interest as distinguished from general interest. Mr. Bacon, chief judge in bankruptcy, speaking on this point, said,<sup>62</sup> "Benevolence, generosity and forbearance may be well exercised—with this restriction, however, that the practice of these moral virtues is not made at the expense of other people. To hold the contrary would be directly opposed to the commonest principles of justice and honesty." <sup>68</sup>

Whether the composition is for the best interests of the creditors usually turns upon the question of the adequacy or inadequacy of the terms offered. Where the court was satisfied that the net assets would amount to eighteen thousand dollars, the court refused to confirm the composition. Where it was shown that a debtor could pay more than seven shillings in the pound and offered to pay one shilling, and four creditors out of five had agreed to the arrangement, the court set aside the deed of arrangement. The consideration that the creditors may lose by the defeat of the pro-

largest creditors opposed. Although the amount offered was somewhat less than the probable value of the assets, the court deemed it advisable to confirm the composition.

<sup>62</sup> Ex parte Williams, 10 L. R. Eq. 61.

63 In re Linderman, 166 Fed. Rep. 593, a case treated as a compromise matter, the court said it was no objection to the compromise nor was it illegal that outside interests had offered to pay certain creditors in full as part of the settlement, but that no weight should be given to the favorable votes of such creditors.

64 Adler v. Jones (C. C. A. 6th Cir.), 109 Fed. Rep. 967, 6 Am. B. R. 245.

65 In re Whipple, No. 17513 Fed. Cas., 2 Low. 404. See also Exparte Jewett, No. 7303 Fed. Cas.,

2 Low. 393; In re Reiman, No. 11673 Fed. Cas., 7 Ben. 455.

66 Ex parte Williams, 10 L. R. Eq. 57. Consult also Ex parte Cowen, 2 L. R. Chan. App. 563; Hart v. Smith, 4 L. R. Q. B. 61; Ex parte Greaves, 5 L. R. Chan. App. 326; Ex parte Duigman, 11 L. R. Eq. 604; Ex parte Levy & Co., 11 L. R. Eq. 619; In re Criterion Watch Case Co., 8 Am. B. R. 206, the bankrupt offered 35 per cent. Opposing creditors were allowed to show an offer from a disinterested party to buy all the bankrupt's assets at a figure that would yield a dividend of 351/2 per cent. On a reference to the referee as a special master, he held that the latter offer was no better than that offered by the bankrupt, because the additional half per cent, would be more than exhausted in the increased costs inposed composition is immaterial as the composition can not be confirmed if the bankrupt has been guilty of any of the acts which would bar a discharge.<sup>67</sup>

In determining the question whether the proposed composition is for the best interests of creditors the judge is vested with the exercise of discretion. It is nevertheless a sound judicial discretion.<sup>68</sup>

# § 697. Because of grounds which would bar a discharge.

The second ground for opposing a confirmation is that the bankrupt has been guilty of an act or failed to perform some of the duties which would be a bar to his discharge.<sup>69</sup>

A bankrupt is not entitled to a discharge when he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with fraudulent intent to conceal his true financial condition, and, in contemplation of bankruptcy, destroyed, concealed, or failed to keep books of account or records from which his true condition might be ascertained. These grounds are discussed in connection with an application for a discharge, to which the reader is referred. These

Where an agreement giving one party more than others is open and known to all, a note given by the bankrupt in carrying it out is not illegal. 70\* A note given in consideration that the creditor would not oppose the confirmation of a composition is illegal, although the creditor claimed his debt was a fiduciary

cident to the administration of the estate. The requisite number and amount of creditors having accepted the bankrupt's offer of composition, the referee's report was affirmed.

<sup>67</sup> In re Griffin, 180 Fed. Rep. 792
25 Am. B. R. 206; In re Godwin,
122 Fed. Rep. 111, 10 Am. B. R. 252.
<sup>68</sup> Adler v. Jones (C. C. A. 6th
Cir.), 109 Fed. Rep. 967, 6 Am. B.
R. 245; Ross v. Saunders (C. C. A.
1st Cir.), 105 Fed. Rep. 915, 5 Am.
B. R. 350, 353.

<sup>69</sup> B. A. 1898, Sec. 12d; In re Godwin, 10 Am. B. R. 252, 122 Fed. Rep. 111. The rule under the act of 1867 was otherwise. In re Haskell, No. 6192 Fed. Cas., 11 N. B. R. 164; In re Becket, No. 1210 Fed. Cas., 2 Woods, 173.

<sup>70</sup> B A. 1898, Sec. 14b.

70† See Secs. 723, et seq., post.

70\* Hickman v. Galveston Dry Goods Co., 42 Tex. Civ. App. 582, 94 S. W. 157. obligation. That fact would not entitle the creditor to priority.<sup>71</sup>

By the amendment of February 5, 1903,71\* the grounds for refusing a discharge were amended to prevent a discharge when the bankrupt has, first, committed an offense punishable by imprisonment as herein provided,72 or, second, with intent to conceal his financial condition, destroyed, concealed or failed to keep books of account or records from which such condition might be ascertained; 73 or, third, obtained money or property on credit upon a materially false statement in writing made by him to any person or his representative. for the purpose of obtaining credit from such person; 73\* or, fourth, at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed any of his property with intent to hinder, delay, or defraud his creditors, 74 or, fifth, in voluntary proceedings been granted a discharge in bankruptcy within six years; or, sixth, in the course of the proceedings in bankruptcy refused to obey any lawful order of or to answer any material question approved by the court. These objections can be made to confirming a composition only in cases begun since the amendment.

The statute does not limit the time for making a composition to that within which a discharge may be granted. It would therefore seem that an objection to the confirmation upon the ground that a discharge was barred by limitation

71 Dicks v. Andrews, 132 Ga. 601,
 64 S. E. 788.

71\* B. A. 1898, Sec. 14b, as amended Feb. 5, 1903, 32 Stat. at L. 797, and June 25, 1910, 36 Stat. at L. 838:

and June 25, 1910, 30 Stat. at L. 838: <sup>72</sup> In re Cohen, 149 Fed. Rep. 908, 18 Am. B. R. 84; burden is on objecting creditor to show the falsity of the questioned statement. In re Seligman, 163 Fed. Rep. 549, 20 Am. B. R. 774. In both these cases

the court held that the statements objected to were not shown to be materially or wilfully false.

78 In re Olman, 134 Fed. Rep. 681, 13 Am. B. R. 395; failure to keep books.

<sup>78\*</sup> In re Seligman, 163 Fed. Rep. 549

74 In re Comstock, 154 Fed. 747, 19 Am. B. R. 65; concealment and disposal of assets.

of time would not be sufficient to prevent the confirmation of a composition. The refusal to confirm a composition must be founded upon acts or an omission to perform duties which would bar a discharge, and not merely for the reason that an application for a discharge can not be made.

Where the bankrupt is found to have fraudulently concealed and disposed of some of his assets, the composition will not be confirmed, even though the requisite number of creditors consent,<sup>75</sup> and even though only one creditor opposes it.<sup>75</sup>

# § 698. Because it was obtained by fraud.

It is an essential condition to the validity of a composition that it shall be in all respects just. Any taint of fraud, whether it consists in concealment, misrepresentation, inequality or injustice wholly vitiates the composition and frees the persons who would otherwise be bound by it.

The court will not hesitate to refuse to confirm a composition when the debtor has deceived the creditors into an agreement, which they would probably not have made had the facts been honestly and fairly before them. Thus it is a good ground for opposing a confirmation that a creditor is induced to sign an acceptance by reason of a present consideration or an expectation of advantage offered by the bankrupt, 76 or by a third person, without the actual knowledge

75 In re Godwin, 122 Fed. Rep. 111, 10 Am. B. R. 252; In re Comstock, 156 Fed. Rep. 747, 19 Am. B. R. 65. In this case it was said: "This may be regarded as working in some cases a hardship to creditors, since a fraudulent bankrupt will often pay a dividend larger than may be secured upon full administration, and since it may be more profitable to condone fraud than to expose and punish it. But the policy of the act, that a fraudulent bankrupt shall be denied a discharge, even if creditors lose

thereby, is sound if the question of bankruptcy administration be broadly considered. A general readiness of creditors to condone fraud, and to accept compromises which yield profits to bankrupts, is a chief encouragement to schemes of fraudulent bankruptcy. To permit even a single creditor to defeat it tends to make such a scheme more difficult of fulfillment, and thus to discourage it."

76 In re Sawyer, No. 12395 Fed.
 Cas., 2 Low. 475; In re Jacobs, No.
 7159 Fed. Cas., 18 N. B. R. 48.

of the bankrupt, when the relation of such person to the bankrupt is such as to arouse suspicion, as an employe or a relation.<sup>77</sup> But the mere fact that a brother procures an assignment of claims openly will not prevent a confirmation when it appears after throwing out his claims that a majority of the creditors have accepted the terms offered.<sup>78</sup> A bankrupt may induce his friends to pay more in composition than his estate would pay in bankruptcy. Such a composition should be confirmed.<sup>79</sup> A creditor may purchase claims for the purpose of using them in opposing a composition.<sup>80</sup>

When the requisite majority of the creditors agree to a composition for much less than the bankrupt is able to pay, fraud may be presumed. Either the assenting creditors know, or they do not know, that the debtor is able to pay a composition of a larger amount than that which he has proposed. If they do not know the debtor's means, it can only be by reason of the debtor's suppression of facts material and essential to the exercise by them of their free will, and in such a case they would be entitled to repudiate the consent, which was obtained from them by such suppression. If, on the other hand, they do know the extent of the debtor's ability to satisfy the debts due to them, and other creditors, and agree to release—and join in compelling unwilling creditors to release—the debtor upon payment of a composition grossly disproportionate to the debtor's means, they willingly and intentionally make themselves parties to a fraud by which the dissentient creditors are prejudiced. In such cases the court

of calling a new meeting an opposing creditor purchased a sufficient number of claims to defeat the confirmation. Judge Lowell said: "I think some illegal motive should be shown beyond the mere desire to defeat the composition upon the ground that it is not for the best interests of the creditors to accept it."

<sup>&</sup>lt;sup>77</sup> In re Bennett, No. 1312 Fed. Cas., 8 Ben. 561.

<sup>&</sup>lt;sup>78</sup> In re Walshe, No. 17118 Fed. Cas., 2 Woods, 225.

<sup>&</sup>lt;sup>79</sup> In re Snelling, No. 13140 Fed. Cas., 19 N. B. R. 120.

<sup>&</sup>lt;sup>80</sup> In re Jewett, No. 7303 Fed. Cas., 2 Low. 393, the court refused to confirm a composition with leave to call a new meeting. Between the order of the court and the time

should refuse to confirm.<sup>81</sup> Where a bankrupt's assets are so trifling that practically there would be no dividend, a composition may be successfully opposed against an attempt by friendly creditors to force a composition upon opposing creditors.<sup>82</sup>

It is undoubtedly a good ground for not confirming a composition if any person has used a false claim in composition personally or by agent, proxy, or attorney, or as agent, proxy, or attorney.<sup>88</sup> Such person also is liable to imprisonment for a period not to exceed two years for the offense.

Where fraud exists the creditors are not bound to raise the question at the time of confirmation. Fraud vitiates the whole confirmation and constitutes the ground for setting it aside. The objections founded upon fraud may be raised either at the time of confirmation or upon an application to set aside a confirmation previously made. Cases upon the question of whether a confirmation may be set aside or not may be profitably consulted in this connection.<sup>84</sup> It is obvious that fraud sufficient to set aside a composition is sufficient to prevent a confirmation.

# § 699. The hearing of objections.

When objections are properly taken to the confirmation of a composition there should be a hearing before the judge.<sup>85</sup> The creditors are entitled to a ten days' notice by mail of such hearing.<sup>86</sup>

The bankruptcy act, section 12, which provides that the bankrupt may offer terms of composition after he has been

<sup>81</sup> As to what is too great a margin, see Sec. 696, ante.

82 In re Russell, 10 Chan. Ap. 255, 263; In re Hannahs, No. 6033 Fed. Cas., 8 Ben. 533, the court refused to confirm a composition of fifty cents for every hundred dollars where the bankrupt had been refused a discharge.

88 B. A. 1898, Sec. 29, clause 3.

<sup>84</sup> As to when a composition may be set aside, see Sec. 705, post.

General Ord. 12, par. 3. In re Criterion Watch Case Co., 8 Am. B. R. 206.

<sup>85</sup> B. A. 1898, Sec. 12c, and Sec. 38, clause 4. Gen. Ord, 12, par. 3.

<sup>86</sup> B. A. 1898, Sec. 58a. Gen. Ord. 12, par. 3. *In rc* Criterion Watch Case Co., 8 Am. B. R. 206. examined "in open court" refers to the proceedings before the referee, but the proceedings on the application for a confirmation of a composition, the fixing of the date for a hearing, and the deposit of the money must be before the judge of the district court. An application for a composition may properly be sent to the referee to ascertain and report whether anything has been done by, or in behalf of the bankrupt to secure a discontinuance of certain objections to the confirmation where the objections filed and withdrawn were well founded and what grounds there are for believing that the composition would be for the best interests of the creditors.

At this hearing evidence may be introduced before the judge, as he may direct, either orally or by depositions or affidavits, and counsel may be heard in support of and against the specification of the grounds of opposition. The judge may refer the matter to a referee with directions to report the facts, but the judge must make the order.<sup>87</sup>\*

The object of this hearing is to satisfy the judge that the composition is for the best interests of the creditors; that the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge and that the offer and its acceptance are in good faith, and have not been made or procured except as provided by the statute, or by any means, promises, or acts therein forbidden. If satisfied of these things it is his duty to confirm the composition. Otherwise he should refuse to confirm it.

## § 700. The order of confirmation.

The statute provides that the judge shall confirm a composition if satisfied that (1) it is for the best interests of the creditors; (2) the bankrupt has not been guilty of any of the

<sup>86\*</sup> In re Bloodworth-Stembridge Co., 178 Fed. Rep. 372, 24 Am. B. R. 156.

<sup>&</sup>lt;sup>87</sup> In re Levy, 172 Fed. Rep. 780, 22 Am. B. R. 769.

<sup>87\*</sup> General Ord. 12, par. 3. In re Criterion Watch Case Co., 8 Am. B. R. 206.

<sup>88</sup> B. A. 1898, Sec. 12d; In re Criterion Watch Case Co., 8 Am. B. R. 206.

acts or failed to perform any of the duties which would be a bar to his discharge; and (3) the offer and its acceptance are in good faith, and have not been made or procured except as provided by the statute, or by any means, promises, or acts therein forbidden.

Where the proceedings have been regular, and the bankrupt has complied with all the conditions specified in the statute, and no opposition is made by the creditors, a *prima* facie case is made which ordinarily satisfies the court that the bankrupt is entitled to have a composition confirmed. The court will thereupon regularly pass an order confirming the composition.<sup>89</sup> This order usually recites the several conditions which have been complied with by the bankrupt. The order concludes "it is therefore hereby ordered that the said composition be and the same is hereby confirmed." <sup>89</sup>

In case there is opposition to the confirmation, and it appears from the evidence that the acceptance of the offer of terms was duly made by the requisite number of creditors, and the court is satisfied that the creditors were fully and honestly advised of the true condition of the bankrupt's affairs, so that they acted intelligently and understandingly in full view of the facts, it will ordinarily confirm the composition.<sup>90</sup>

On the other hand, if the court is satisfied from the evidence that the composition has not been honestly made as between the debtor and the creditors, or that it is not for the best interests of them all, or that it appears that the bankrupt has committed or omitted to do some act which would bar his

89 Official Form No. 62; see Form No. 113, post; In re Frear, 10 Am. B. R. 199, 120 Fed. Rep. 978; In re Waynesboro Drug Co., 157 Fed. Rep. 101, 19 Am. B. R. 487; In re Seligman, 163 Fed. Rep. 549.

90 In re Seligman, 163 Fed. Rep. 549; In re Waynesboro Drug Co., 157 Fed. Rep. 101, 19 Am. B. R. 487; In re Criterion Watch Case

Co., 8 Am. B. R. 206; In re Reiman, No. 11675 Fed. Cas., 12 Blatch. 562; In re Greenebaum, No. 5769 Fed. Cas., 1 Chi. L. J. 599; In re Walshe, No. 17118 Fed. Cas., 2 Woods, 225; In re Weber Furniture Co., No. 17331 Fed. Cas., 13 N. B. R. 599; In re Spades, No. 13196 Fed. Cas., 6 Biss. 448.

discharge, or if the proceedings have been irregular, the court should refuse to pass an order of confirmation.<sup>90\*</sup> The court may refer the matter to a referee for further inquiry.<sup>90\*\*</sup>

Whenever a composition is not confirmed, the estate is administered in bankruptcy as otherwise provided by the statute.<sup>91</sup> Whether the order shall be granted or refused, rests in the sound judicial discretion of the judge.<sup>92</sup> An order entered by consent may be stayed to let new creditors not consenting come in.<sup>93</sup> The judge may provide for a dispute or an unliquidated claim in composition cases.<sup>94</sup>

A certified copy of an order confirming or setting aside a composition, or granting or setting aside a discharge, not revoked, is evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made. 95

#### § 701. Review by appeal.

An appeal lies from an order refusing 96 or granting 97 a confirmation of a composition.

90\* Riley v. Pope, 186 Fed. Rep. 857, 26 Am. B. R. 618; In re Woodend, 133 Fed. Rep. 593, 12 Am. B. R. 768; In re Frear, 120 Fed. Rep. 978, 10 Am. B. R. 199; In re Asten, No. 594 Fed. Cas., 8 Ben. 350; see also In re Henry, No. 6370 Fed. Cas., 9 Ben. 449; In re Rodger, No. 11992 Fed. Cas., 18 N. B. R. 381.

90\*\* In re Levy, 172 Fed. Rep. 780, 22 Am. B. R. 769.

<sup>91</sup> B. A. 1898, Sec. 12e.

92 Adler v. Jones (C. C. A. 6th
Cir.), 109 Fed. Rep. 967, 6 Am. B.
R. 245, 248; Ross v. Saunders (C.
C. A. 1st Cir.), 105 Fed. Rep. 915,
5 Am. B. R. 350, 353,

<sup>93</sup> In re Lockwood & Co., 104 Rep. 794, 4 Am. B. R. 731.

94 Ex parte Trafton, No. 14133 Fed. Cas., 2 Low. 505; see In re Kahn, 121 Fed. Rep. 412, 9 Am. B. R. 107, 109.

<sup>95</sup> B. A. 1898, Sec. 21f. See also as to the conclusiveness of an order of confirmation. Smith v. Engle, 14 N. B. R. 481.

96 In re Friend (C. C. A. 7th Cir.), 134 Fed. Rep. 778, 13 Am. B.
R. 595; United States v. Hammond, 104 Fed. Rep. 862; 4 Am.
B. R. 736, reaffirmed in Adler v.
Jones (C. C. A. 6th Cir.), 109 Fed.
Rep. 967, 6 Am. B. R. 245. But see Ross v. Saunders (C. C. A. 1st Cir.), 105 Fed. Rep. 915, 5 Am. B.
R. 350.

97 Marshall Field & Co. v. Wolf Bros. Dry Goods Co. (C. C. A. 8th Cir.), 120 Fed. Rep. 815, 9 Am. B. R. 693; City National Bank of Dallas v. Doolittle (C. C. A. 5th Cir.), 107 Fed. Rep. 236, 5 Am. B. R. 736. A petition for revision is improper, except where leave is denied to file a petition to set aside a confirmation. Creditors interested adversely must be made parties to the appeal, or a sufficient number to fairly represent their interests. Where the bankrupt appealed from an order refusing to confirm a proposed composition which the trustee alone opposed, the appeal was dismissed.

## § 702. The effect of a confirmation of a composition.

The confirmation of a composition has the effect:

First, to revest in the bankrupt the title to his estate and property and discharge the trustee. The confirmation of a composition ipso facto revests in the bankrupt under Section 70f, title to all his property. Second, to discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge.2\*

A composition is at once a settlement and a discharge.<sup>3</sup> No other discharge than an order of confirmation is needed.<sup>4</sup> The judge can not give the bankrupt a binding certificate that he has performed a composition under the act of 1867.<sup>5</sup>

The confirmation of a composition does not have the effect to terminate the proceedings, to deprive the court of jurisdiction, to pass on accounts of the trustee, direct the trustee to be discharged and the estate to be closed.<sup>5</sup>\*

<sup>99</sup> In re Friend (C. C. A. 7th Cir.), 134 Fed. Rep. 778, 13 Am. B. R. 595, motion to dismiss revisory proceedings granted.

100 Marshall Field & Co. v. Wolf Bros. Dry Goods Co. (C. C. A. 8th Cir.), 120 Fed. Rep. 815, 9 Am. B.

- <sup>1</sup> Ross v. Saunders (C. C. A. 1st Cir.), 105 Fed. Rep. 915, 5 Am. B. R. 350.
- <sup>2</sup> B. A. 1898, Sec. 70f; Legion v. Allen, 56 Miss. 632; Bracklee Co. v. O'Connor, 122 N. Y. Suppl. 710.

- 2\* In re Jersey Island Co., 152
   Fed. Rep. 839, 18 Am. B. R. 417.
- <sup>8</sup> B. A. 1898, Sec. 14c; In re Ullman, 180 Fed. Rep. 944, 24 Am. B. R. 755. Consult Leibke v. Thomas, 116 U. S. 605, 29 L. Ed. 744.
- In re Becket, No. 1210 Fed. Cas.,
   Woods, 173.
- <sup>5</sup> Wittemore v. Stephens, 48 Mich. 573, 12 N. W. 858.
- 5\* United States v. Sondheim, 188 Fed. Rep. 378; In re Cadenas & Coe, 178 Fed. Rep. 158, 24 Am. B. R. 135.

The confirmation of a composition has the effect of discharging the bankrupt from claims provable in bankruptcy,6 although the creditors did not actually prove their debts or participate in the composition proceedings.6\* It releases the bankrupt from such debts only as a discharge.<sup>7</sup> A discharge in bankruptcy releases a bankrupt from all of his provable debts, except such as are due as a tax levied by the United States, the state, county, district, or municipality in which he resides; are liabilities for obtaining property by false pretenses, or false representations, or for willful and malicious injuries to the person or property of another, or for alimony due ór to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or criminal conversation; have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.8

The confirmation of a composition will regularly discharge a debt created by fraud. It will not discharge a debt or liability incurred in and by a bankrupt acting in a fiduciary capacity, nor a stockholder's contingent liability not scheduled, or a contingent liability not provable, nor the liability of a person who is a codefendant with or guarantor,

<sup>6</sup> Mandell v. Levy, 93 N. Y. Suppl. 545, 47 Miss. 147; Taylor v. Skiles, 113 Tenn. 288, 81 S. W. 1258; In re Jersey Island Co., 152 Fed. Rep. 839, 18 Am. B. R. 417; In re Coe, 169 Fed. Rep. 1002, 22 Am. B. R. 384.

6\* Glover Grocery Co. v. Dorne, 116 Ga. 216, 8 Am. B. R. 702; Mc-Gehee v. Hentz, No. 8794 Fed. Cas., 19 N. B. R. 136.

Wilmot v. Mudge, 103 U. S. 217,
 L. Ed. 536; Bayly v. University,
 U. S. 11, 27 L. Ed. 97.

<sup>8</sup> B. A. 1898, Sec. 17, as amended

by the act of Feb. 5, 1903, 32 Stat. at L. 797.

<sup>9</sup> Crawford v. Burke, 195 U. S. 176, 49 L. Ed. 147, 12 Am. B. R. 659.

The rule was otherwise under the law of 1867. Wilmot v. Mudge, 103 U. S. 217, 26 L. Ed. 536.

<sup>10</sup> Bayly v. University, 106 U. S.11, 27 L. Ed. 97.

<sup>11</sup> Flower v. Greenebaum, 2 Fed. Rep. 897.

<sup>12</sup> Nat. Mt. Wollaston Bank v. Porter, 122 Mass. 308,

or in any manner a surety for a bankrupt, <sup>18</sup> nor the debt of a creditor whose name does not appear in the statement of the debtor or otherwise in the composition proceedings and whose debt is not mentioned, <sup>14</sup> unless such person had actual knowledge of the proceedings in bankruptcy. <sup>15</sup> Such notice to a creditor, whose claims are omitted from the schedules, should be given before application for confirmation is filed. <sup>16</sup> One not a party to a composition is nevertheless bound by it where he has proved his claim in bankruptcy and has received a dividend under the composition. <sup>17</sup>

Where the consideration consists of negotiable paper, and the bankrupt does not fulfill his obligations and agreements in connection therewith, the creditor may recover his whole debt from the bankrupt. The confirmation of a composition does not release the bankrupt from debts agreed to be paid by the terms of the composition. If the bankrupt fails to make good his part the consideration fails and the whole debt revives.

<sup>13</sup> B. A. 1898, Sec. 16; Moore v. Stanwood, 98 Ill. 605; *In re* Burchell, 4 Fed. Rep. 406; Guild v. Butler, 122 Mass. 498, 23 Am. Rep. 378; Smith v. Rucker, 88 Ark. 615, 114 S. W. 1181.

Where the holder of a note joins in a composition, he thereby discharges the liability of the endorsers. Matter of Harry Benedict, 18 Am. B. R. 604.

14 Broadway Trust Co. v. Manheim (Sup. Ct. N. Y.), 14 Am. B. R. 122; Harrison v. Gamble, 69 Mich. 96; Robinson v. Soule, 56 Miss. 549. See also *In re* Blackmore, 11 Fed. Rep. 412.

15 Collins v. Burns, 3 Ga. App.238, 59 S. E. 727.

<sup>16</sup> Broadway Trust Co. v. Manheim (Sup. Ct. N. Y.), 14 Am. B. R. 122.

<sup>17</sup> Clairmonte v. Napier Motor

Co, of America (Cal. App. 1909), 104 Pac. 712.

18 In re Negley, 20 Fed. Rep. 499; In re Hurst, No. 6925 Fed. Cas., 1 Flip. 462; Ransom v. Geer, 12 Fed. Rep. 607; In re Eisenberg, 148 Fed. Rep. 325, 16 Am. B. R. 776, obiter. See In re A. B. Carton & Co., 148 Fed. Rep. 63, 17 Am. B. R. 434; where, however, the composition was not under the Act (17 Am. B. R.), although it was the basis for the dismissal of an involuntary petition. It was also held here that on'a second proceeding that the creditors could prove for the full amount of their debts, as proved in the first proceeding, credit for the sums actually paid thereon being given, and that in this second proceeding it was too late to question the amount of these claims on the hearing of the application for a discharge.

A new promise after composition is without consideration, and will not afford a cause of action, as this is a settlement by agreement leaving not even a moral obligation.<sup>19</sup>

The order confirming a composition is not a bar to a suit to collect the whole debt, when the composition was procured by fraud.<sup>20</sup> The reason for this rule is that fraud vitiates the whole composition and leaves the debtor and the bankrupt in the same position that they were before the composition was attempted.

The composition proceedings will not operate to deprive a secured creditor of the right, after exhausting his own security, to assert against the bankrupt a claim for deficiency.<sup>21</sup> Such proceedings will not affect a vested right or security.<sup>22</sup> Secured creditors are not parties to the composition.

An agreement or note entered into secretly for the purpose of obtaining a composition with creditors can not be enforced against the bankrupt, because the consideration is illegal.<sup>23</sup>

#### § 703. Pleading a composition in bar of suit on debt.

A composition may be pleaded in bar of actions upon debts discharged.<sup>24</sup> In order to be available as defense it must be pleaded.<sup>25</sup> The confirmation may be pleaded in bar of a

<sup>19</sup> Taylor v. Skiles, 113 Tenn. 288, 81 S. W. 1258.

<sup>20</sup> Brownsville Manufacturing Co.
v. Lockwood, 11 Fed. Rep. 705;
Pukpe v. Churchill, 91 Mo. 81; Exparte Halford, 19 L. R. Eq. 436.

<sup>21</sup> Paret v. Ticknor, No. 10711 Fed. Cas., 4 Dill. 111, per Mr. Justice Miller; Cavanna v. Bassett, 3 Fed. Rep. 215; *In re* Kahn, 121 Fed. Rep. 418, 9 Am. B. R. 107, 111, citing text.

<sup>22</sup> In re Stowell, 24 Fed. Rep. 468.
<sup>23</sup> McCormick v. Solinsky (C. C. A. 5th Cir.), 152 Fed. Rep. 984, 18 Am. B. R. 40; In re Sacharoff & Kleiner. 163 Fed. Rep. 664, 20 Am. B. R. 814; Carey v. Hess, 112 Ind. 398; Tirrell v. Freeman, 139 Mass. 297; Blasdel v. Fowle, 120 Mass.

447; Woodman v. Stowe, 11 Bradw. (III. Ap. Ct.) 613; Tinker v. Hurst, 70 Mich. 159. See Batchelder & Lincoln Co. v. Whitmore '(C. C. A. 1st Cir.), 122 Fed. 355, 10 Am. B. R. 641, obiter.

<sup>24</sup> Mandell v. Levy, 93 N. Y. S. 545, 47 Miss. 147; Glover Grocery Co. v. Dorne, 116 Ga. 216, 8 Am. B. R. 702; Broadway Trust Co. v. Manheim, 95 N. Y. Supp. 93, 14 Am. B. R. 122; Consolidated Rubber Tire Co. v. Vehicle Equip. Co., 121 N. Y. App. Div. 764, 19 Am. B. R. 862.

<sup>25</sup> Broadway Trust Co. v. Manheim, 95 N. Y. Supp. 93, 14 Am. B. R. 122; *In re* Tooker, No. 14096 Fed. Cas., 8 Ben. 390. See pleading a discharge, Sec. 802, post.

suit subsequently commenced by a creditor against the stock-holders of the late bankrupt, although leave to sue was given by the bankruptcy courts to the creditor before the confirmation, and an answer setting up such a bar should not be over-ruled as frivolous.<sup>26</sup>

It has been said that the effect of the confirmation as a discharge is not before the bankruptcy court.<sup>27</sup> But it becomes an issue when the discharge is properly pleaded.

### § 704. Proceedings after a confirmation of a composition.

Upon the confirmation of a composition the consideration is distributed as the judge shall direct, and the case dismissed.<sup>28</sup>

The form of order for distribution on composition is prescribed by the supreme court.<sup>29</sup> It provides that the deposit shall be distributed by the clerk of the court as follows: 1st, to pay the several claims which have priority; 2d, to pay the costs of proceedings; <sup>30</sup> 3d, to pay, according to the terms of the composition, the several claims of general creditors which have been allowed, and appear upon a list of allowed claims, on the files in the case.

Only those creditors who prove their claims within one year from the date of adjudication can have dividends from the estate, or assert a right to share in the funds paid in composition.<sup>30</sup>\* Secured creditors may share in the distribution to the extent their claims exceed their security.<sup>31</sup> The officers

<sup>26</sup> Consolidated Rubber Tire Co. v. Vehicle Equipment Co., 19 Am. B. R. 862, 121 App. Div. (N. Y.) 764, 106 N. Y Supp. 599, citing the text.

27 In re Cooper Bros., 166 Fed.
 Rep. 932, 20 Am. B. R. 634, 636; In re Eisenberg, 148 Fed. Rep. 325, 16
 Am. B. R. 776.

<sup>28</sup> B. A. 1898, Sec. 12e; United States v. Sondheim, 188 Fed. Rep. 378. As to set-offs in composition, see *In re* Lissburger, 2 Fed. Rep. 153; *In re* Purcell, No. 11470 Fed. Cas., 18 N. B. R. 447; *Ex parte* 

Howard Nat. Bank, No. 6764 Fed. Cas., 2 Low. 487; Ex parte Harris, No. 6109 Fed. Cas., 2 Low. 568.

<sup>29</sup> Official Form No. 63; see Form No. 114, post.

<sup>30</sup> In re Harris, 9 Am. B. R. 20, 117 Fed. Rep. 575.

<sup>80\*</sup> In re Abrams & Rubins, 173 Fed. Rep. 430, 23 Am. B. R. 25, it was held that if a creditor, whose claim was not scheduled, stands by without proving his claim takes the risk of a composition leaving him out.

<sup>31</sup> In re Kahn, 121 Fed. Rep. 418,
 9 Am. B. R. 107; Paret v. Ticknor.

of the court can not know what amount should be paid to a creditor, or, indeed, who are creditors, except upon proof of their claims in the time and manner provided by law. The services of a trustee are dispensed with. When the property has thus been distributed, the case is dismissed by the judge and the proceedings are at an end.

The bankrupt is entitled to the money remaining in court unclaimed after the expiration of the year in which proof of claims could be made, and the creditor can not be heard to say that it was not in fault in respect to the failure to present its claim. The language of the statute permits no exceptions to its terms.<sup>32</sup> A claimant is entitled to property leased to bankrupt and which is not used in the composition.<sup>33</sup>

Upon the confirmation of a composition offered by a bank-rupt the title to his property thereupon revests in him.<sup>34</sup> The title is passed by operation of law, and no deed is necessary to convey. A certified copy of an order confirming a composition constitutes evidence of the revesting of the title of his property in the bankrupt, and if recorded imparts the same notice that a deed from the trustee to the bankrupt if recorded would impart.<sup>35</sup>

The confirmation of the composition does not terminate the court's jurisdiction over property in the possession of its receiver which is adversely claimed.<sup>36</sup> The necessary orders to carry the confirmation into execution may be made.<sup>37</sup>

16 N. B. R. 315; Cavanna v. Bassett, 3 Fed. Rep. 215.

<sup>82</sup> In re Brown, 123 Fed. Rep. 336,
10 Am. B. R. 588; In re Lane, 125
Fed. Rep. 772, 11 Am. B. R. 136.
Compare, however, In re Simon
Fox, 6 Am. B. R. 525.

33 In re Winship Co. (C. C. A. 7th Cir.), 120 Fed. Rep. 93, 9 Am. B. R. 638.

34 B. A. 1898, Sec. 70f. In York Mfg. Co. v. Merchants' Refrigerating Co., 168 Fed. Rep. 168, 21 Am. B. R. 748, it seems that the composition as confirmed did not include lien creditors, for leave was given

plaintiff to proceed to foreclose its alleged mechanic's lien. It was also suggested that plaintiff must elect between accepting its share under the composition and relying on its claim of lien.

<sup>35</sup> B. A. 1898, Sec. 21g.

36 In re J. C. Winship Co. (C.
C. C. A. 7th Cir.), 120 Fed. Rep.
93, 9 Am. B. R. 638; In re Cadenas
& Coe, 178 Fed. Rep. 158; United
States v. Sondheim, 188 Fed. Rep.
378

<sup>37</sup> United States v. Sondheim, 188 Fed. Rep. 378; *In re* Simon Fox, 6 Am. B. R. 525. Compare City Na-

Likewise pending the decision on an application to set aside the confirmation, the referee has jurisdiction to appoint a temporary receiver.<sup>38</sup> A bankrupt is not entitled to a fee for an attorney contesting a confirmation.38\*

#### Setting aside a confirmation. § 705.

The courts of bankruptcy are expressly given power to set aside a composition and to reinstate the case.<sup>39</sup> The application to set aside a confirmation should be made to the judge, and not to the referee,40 although it may be referred to the referee as a master.

No other court can set aside a composition except the court of bankruptcy which confirmed the composition. An order of confirmation of a composition can not be assailed collaterally in any other court, even for fraud in procuring it.41 The statute expressly provides that "a certified copy of an order confirming or setting aside a composition, not revoked, shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made." 42

The application is made by petition, which should be entitled in the court and cause. The creditors assenting to the confirmation as well as the bankrupt are proper, if not essential, parties defendant. 43 It should set forth the grounds upon which the composition is asked to be set aside.

tional Bank of Dallas v. Doolittle (C. C. A. 5th Cir.), 107 Fed. Rep. 236, 5 Am. B. R. 736, 741; In re Rider, 96 Fed Rep. 608, 3 Am. B. R. 178.

38 In re Sonnabend, 18 Am. B. R. 117. In Schuler v. Woodward, 169 Fed. Rep. 1012, it was held that a stockholder can not enjoin a plan to reorganize the bankrupt corporation and to buy the assets of the old corporation at the trustee's sale. 38\* In re Fogarty (C. C. A., 7th

Cir.), 187 Fed. Rep. 773, 109 C. C. A. -, 26 Am. B. R. 568.

<sup>39</sup> B. A. 1898, Sec. 2, clause 9, In re Rudnick, 93 Fed. Rep. 787, 2 Am. B. R. 114.

40 B. A. 1898, Sec. 13; In re Sonnabend, 18 Am. B. R. 117.

<sup>41</sup> Turner v. Hodson, 105 Me. 476, 75 Atl. 45; Loeffler v. Wright (Cal. App. 1910), 109 Pac. 269.

42 B. A. 1898, Sec. 21f.

48 In re Wrisley Co. (C. C. A. 7th Cir.), 133 Fed. Rep. 388, 13 Am. B. R. 193; see also Marshall Field & Co. v. Dry Goods Co. (C. C. A. 8th Cir.), 120 Fed. Rep. 815, 9 Am. B. R. 693.

only ground upon which a composition can be set aside and the case reinstated is when it is made to appear upon the trial that fraud was practiced in the procuring of such composition, and that the knowledge thereof has come to the petitioners since the confirmation of such composition.<sup>44</sup> The petition should conclude with a prayer that the composition be set aside and be signed by a "party in interest." The word "creditors" was used in the former act.45 The word "parties in interest" is a broader term, but in practice the application usually is made by a creditor. But a creditor, who has assigned his claim is not then a party in interest.46 A secured creditor can not make an application because he has no interest in the composition.47 The petition must be verified. An affidavit "on information and belief" is not sufficient.48 The sufficiency of the petition may be tested by a demurrer thereto,49 or by motion to dismiss.50

The petition must be filed in the clerk's office within six months after the composition has been confirmed.<sup>51</sup> to file such a petition will ordinarily be granted as a matter of course.<sup>52</sup> A trial is had upon notice to all creditors.<sup>53</sup>

44 B. A. 1898, Sec. 13. As to the sufficiency of a pétition in this regard, see In re Roukous, 128 Fed. Rep. 645, 12 Am. B. R. 128.

45 R. S. Sec. 5103,

46 In re Wrisley Co. (C. C. A. 7th Cir.), 133 Fed. Rep. 388, 13 Am. B. R. 193.

47 In re Scott, No. 12519 Fed. Cas., 15 N. B. R. 73.

48 In re Roukous, 128 Fed. Rep. 645, 12 Am. B. R. 170,

49 In re Jersey Island Packing Co. 152 Fed. Rep. 839, 18 Am. B. R. 417; In re Roukous (128 Fed. Rep. 645), 12 Am. B. R. 128. It was here held that the petition need not aver a tender back of the money received under the composition.

<sup>50</sup> In re Roukous, 128 Fed Rep. 648, 12 Am, B. R. 169, overruling such a motion based on the creditors having commenced thereafter an action at law against the bankrupt.

<sup>51</sup> B. A. 1898, Sec. 13a. In re Eisenberg, 148 Fed. Rep. 325, 16 Am. B. R. 776, pointing out clearly that this rule does not prevent the original debt being revived on the failure of the bankrupt to perform the terms of the composition. In re Jersey Island Packing Co., 152 Fed. Rep. 839, 18 Am. B. R. 417, the court holding that Sec. 15 of the act has no application to this class of cases.

52 In re Wrisley Co. (C. C. A. 7th Cir.), 133 Fed. Rep. 388, 13 Am.

B. R. 193.

<sup>58</sup> In re Diggles, No. 3905 Fed. Cas., 8 Ben. 36; Ex parte Hamlin, No. 5993 Fed. Cas., 2 Low. 571.

Evidence may be introduced and counsel heard for and against the petition. If the allegations in the petition are supported by sufficient evidence the court will order the composition set aside and the case reinstated,54 and if not, it will order the petition dismissed.<sup>55</sup> A composition will not be set aside on the ground that a creditor had failed to get notice of the proceedings because his address was mis-stated in the bankrupt's schedule by mistake.<sup>56</sup> A composition may be set aside where a trustee joins with the bankrupt to effect a composition to the detriment of the creditors by false representations as to the assets.<sup>57</sup> The fact that the moving creditor erroneously omitted from its proof of claim the larger part of its claim, is no ground for setting aside the order of confirmation, and this is true although the correct amount was stated in the schedules and in the consent, but payment was made only on the basis of the proof of claim.<sup>58</sup> A petition to set aside an adjudication is not demurrable because the fraud relied on, if discovered in time, would have prevented the composition originally.<sup>59</sup>

A petition that the bankrupts pay the same proportion of their debt to a creditor whose claim was not scheduled or filed that he has paid the others can not be granted but may be reformed as a petition to reopen the composition if the creditor wishes it to stand as such. A composition once con-

<sup>54</sup> B. A. 1898, Sec. 2, clause 9;
Fairbanks v. Amoskeag Bank, 38
Fed. Rep. 630; Ex parte Williams,
10 L. Rà Eq. 57.

<sup>55</sup> City Nat. Bank v. Doolittle (C. C. A. 5th Cir.), 107 Fed. Rep. 236, 5 Am. B. R. 736; *In re* Shaw, 9 Fed. Rep. 495; Pool v. McDonald, No. 11268 Fed. Cas., 15 N. B. R. 560.

<sup>56</sup> In re Rudnick, 93 Fed. Rep. 787, 2 Am. B. R. 114.

<sup>57</sup> In re Wrisley Co., 133 Fed. Rep. 388, 13 Am. B. R. 193.

<sup>58</sup> In re Cooper Bros., 166 Fed. Rep. 932; 20 Am. B. R. 634.

<sup>59</sup> In re Roukous, 128 Fed. Rep.

645, 12 Am. B. R. 128; In re Sacharoff & Kleiner, 163 Fed, Rep. 664, 20 Am. B. R. 814, 817. In the latter case the court refused to set aside the confirmation, although it was shown that promissory notes were given certain creditors in addition to their share in the composition, especially as the hands of the complaining creditor were not clean. Here, however, a second bankruptcy proceeding was pending, and the court stated that such notes would be considered void where they had not been transferred to holders in due course.

firmed can be set aside only if procured by fraud. It will be quite enough to show fraud that the attorneys for the bankrupt, while the composition was being put through, kept assuring the excluded creditor that there was no haste, and that he would be included in the composition. Except in the case of fraud it is quite clear that one who finds he is not excluded in the schedules, takes his own risk of a composition being made and confirmed without his being included. 60

## § 706. Proceedings after composition set aside.

Whenever a composition has been set aside the creditors, at their first meeting thereafter, must appoint one or three trustees of such estate, and fix the amount of the bonds as in the first instance. The trustee, upon his appointment and qualification, is vested with the title to all of the property of the bankrupt as of the date of the final decree setting aside the composition. Pending the decision on the petition to set aside the confirmation, it has been held that the referee has jurisdiction to reopen the estate and appoint a temporary receiver to care for the assets of the estate.

The case then proceeds as if no composition had been made. The property is distributed in the same manner, except that in the event of the confirmation of a composition being set aside, the property acquired by the bankrupt, in addition to his estate at the time the composition was confirmed or the adjudication was made, is applied to the payment in full of the claims of creditors for property sold to him on credit, in good faith, while such composition or discharge was in force, and the residue, if any, is applied to the payment of the debts which were owing at the time of the adjudication.<sup>64</sup>

60 In re Abrams & Rubins, 173Fed. Rep. 430, 23 Am. B, R. 25.

61 B. A. 1898, Sec. 44.

62 B. A. 1898, Sec. 70d.

63 In re Sonnabend, 18 Am. B. R.
 117. But see In re Fox, 6 Am. B.
 R. 526

64 B. A. 1898, Sec. 64c; In re Sacharoff v. Kleiner, 163 Fed. Rep. 664, 20 Am. B. R. 818. This rule was applied where there was a second bankruptcy proceeding pending, the court refusing to set aside the confirmation in a prior proceeding.

It has been said that the setting aside of a composition will not ordinarily have the effect of invalidating pro rata payments made in pursuance of the composition.<sup>65</sup>

#### § 707. Bankrupt's failure to perform terms of composition.

On breach of an agreement by the bankrupt in composition the creditor may then bring action on the original claim.<sup>66</sup>

#### § 708. Arbitration and compromise.

A trustee may, pursuant to the direction of the court, submit to arbitration any controversy arising in the settlement of the estate <sup>67</sup> or he may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interests of the estate.<sup>68</sup>

Whenever a trustee makes application to the court for authority to submit a controversy arising in the settlement of a demand against a bankrupt's estate, or for a debt due to it, to the determination of arbitrators, or for authority to compound and settle such controversy by agreement with the other party, the application must clearly and distinctly set forth the subject-matter of the controversy, and the reason why the trustee thinks it proper and most for the interest of the estate that the controversy should be settled by arbitration or otherwise. 69

Whenever it may be deemed for the benefit of the estate of a bankrupt to compound and settle any debts or other claims due or belonging to the estate of the bankrupt, the trustee, or the bankrupt, or any creditor who has proved his debt, may file his petition therefor; and thereupon the court

65 In re Roukous, 128 Fed. Rep.645, 12 Am. B. R. 128, 131.

<sup>66</sup> Pupke v. Churchill, 91 Mo. 81,
3 S. W. 829 (under the statute of 1867). Page v. Carton, 120 N. Y. Suppl. 277, 64 Misc. 645.

<sup>67</sup> B. A. 1898, Sec. 26a. Compare R. S. Sec. 5061.

<sup>68</sup> B. A. 1898, Sec. 27; In re Heyman, 108 Fed. Rep. 207, 5 Am. B.
R. 808; In re Linderman, 166 Fed.
Rep. 593, 22 Am. B. R. 131.

In re Northampton Portland Cement Co., 185 Fed. Rep. 542, 25 Am. B. R. 565, the court refused to approve a reorganization scheme.

69 General Ord. 33.

appoints a suitable time and place for the hearing thereof, notice of which is given as the court shall direct, so that all creditors and other persons interested may appear and show cause, if any they have, why an order should not be passed by the court upon the petition authorizing such act on the part of the trustee.<sup>70</sup>

Under the act of 1867 it was held that such applications must be made to the judge.<sup>71</sup> Under the present act the referee is authorized, subject always to a review by the judge, within the limits of his district as established from time to time, to perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges as are by the bankrupt statute conferred on courts of bankruptcy, and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as otherwise provided by statute.<sup>72</sup> It seems, therefore, that an application to compromise or to submit to arbitration any controversy arising in the administration of the estate may be made to the referee or to the judge.

In either case a ten days' notice should be given by mail to the creditors, of the time and place of the hearing on the petition. The notice is usually in the form of a rule to show cause. At the hearing the court may hear testimony and arguments of counsel in support of and against the petition, and pass an order granting or refusing to grant the prayer of the petition. It may be doubted if the court can by a general order authorize the trustee to compound all doubtful claims, with the consent of a committee of the creditors. The proceedings should be in accordance with the provisions of the statute and general orders. Agree-

<sup>70</sup> General Ord. 28.

<sup>&</sup>lt;sup>71</sup> In re Graves, No. 5709 Fed. Cas., 2 Ben. 100.

 <sup>72</sup> B. A. 1898, Sec. 38, clause 4.
 78 B. A. 1898, Sec. 58a; In re
 Hoole, 3 Fed. Rep. 496.

<sup>&</sup>lt;sup>74</sup> See *In re* Dibblee, No. 3885 Fed. Cas., 3 Ben. 354.

<sup>&</sup>lt;sup>75</sup> In re Linderman, 166 Fed. Rep. 593, 22 Am. B. R. 131, the court approved, with certain modifications, an offer to pay a certain sum to the bankrupt's estate, on condition that certain preferential transfers should be allowed to stand. The court treated the matter as a compromise.

ments made with the approval of the referee respecting the facts in a controversy with adverse claimants are binding on the bankrupt's estate in the absence of fraud.<sup>76</sup>

A bankrupt has no right to file a bill in equity in a state court seeking to restrain his trustee and his wife from carrying out a proposed compromise, on the ground that if the compromise is proved there will be a balance over indebtedness for him.<sup>77</sup>

When leave is granted to submit a controversy to arbitration, three arbitrators are chosen by mutual consent, or one by the trustee, one by the other party to the controversy, and the third by the two so chosen, or if they fail to agree in five days after their appointment the court appoints the third arbitrator.<sup>80</sup> The arbitrators, upon inquiry, consider the controversy, and should report their finding in writing.

The written finding of the arbitrators, or a majority of them, as to the issues presented, may be filed in court, and have like force and effect as the verdict of a jury.<sup>81</sup> It is subject to be set aside or adjudged upon by the court as a verdict would be.<sup>82</sup> An order of reference to a private person to take and state the evidence, and his conclusions of law and fact to the court for the further action of the court is in effect an appointment of an arbitrator and his findings can be assailed and set aside only for fraud, misconduct, or other well settled legal reasons.<sup>83</sup>

If the award of the arbitrators is a lien under the state law and not within four months of bankruptcy it is valid in the bankruptcy proceedings.<sup>88</sup>\*

#### § 709. Informal compositions.

The bankruptcy act only contemplates one form of composition, being that above described.<sup>84</sup>

<sup>76</sup> Bryant v. Swofford Bros., 214 U. S. 279, 53 L. Ed. 997.

<sup>77</sup> In re Kranich, 174 Fed. Rep. 908, 23 Am. B. R. 550.

80 B. A. 1898, Sec. 26b; In re Mc-Lam, 97 Fed. Rep. 922, 3 Am. B. R. 245.

81 B. A. 1898, Sec. 26c.

82 In re McLam, 97 Fed. Rep. 922, 3 Am. B. R. 245.

88 Westall, et al., v. Avery (C. C.
 A. 4th Cir.), 96 C. C. A. 428, 171
 Fed. Rep. 626, 22 Am. B. R. 673.

<sup>83\*</sup> In re Koslowski, 153 Fed. Rep. 823.

84 B. A. 1898, Secs. 12 and 13;

Other forms of settlement are so frequently adopted by creditors, either with or without bankruptcy proceeding, that their legal aspects have come before the courts for consideration. If the extra-judicial settlement with the creditors results in a proof, it must be surrendered by the creditor when he comes to prove his claim. On the same principle such a proof could in a proper case be recovered by the trustee.

Where all the creditors have been paid ratably, it would seem that there would be no cause for complaint. <sup>86</sup> It has been held that a settlement made in 1896 was not within the scope of the present bankrupt law, although any excess improperly added to the claim would have to be deducted before it could be allowed. <sup>87</sup> Such settlements not in the precise manner contemplated by the act are attended with a certain amount of risk, such as the appearance of unexpected creditors. <sup>88</sup>

In re Criterion Watch Case Co., 8
 Am. B. R. 206; In re John M.
 Frear, 120 Fed. Rep. 978, 10 Am.
 B. R. 109.

<sup>85</sup> In re Wertheimer, 6 Am. B. R. 756, affirming 6 Am. B. R. 187.

86 In the case of *In re* Back Bay Automobile Co., 19 Am. B. R. 835, no question was made of a prior settlement of this character. It appears from the report of the case that there had been previous invol-

untary proceedings instituted against the present voluntary bankrupts, which first proceeding was dismissed by agreement when the settlement was made.

87 Batchelder & Lincoln Co. v.
 Whitmore (C. C. A. 1st Cir.), 122
 Fed. 355, 10 Am. B. R. 641.

<sup>88</sup> In re Lockwood & Co., 104 Fed. Rep. 794, 4 Am. B. R. 731. Here an attempt had been made to deposit enough to pay all claims in full.

# ÇHAPTER XXXVI.

## DISCHARGE.

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#### § 710. Who may apply for a discharge.

Any person who has been adjudged a bankrupt may file an application for a discharge in the court of bankruptcy in which the proceedings are pending.<sup>1</sup> This includes involuntary as well as voluntary bankrupts. The insanity of a bankrupt does not affect his right to apply for a discharge.<sup>2</sup>

## § 711. Petition for discharge.

The application for a discharge should be by a petition in the prescribed form.<sup>3</sup>

It should be entitled in the court and cause and addressed to the judge. It must state concisely, in accordance with the provisions of the bankrupt act and the orders of the court, the proceedings in the case and the acts of the bankrupt.4 Thus it should state the name of the bankrupt, his residence and the date on which he was adjudged a bankrupt; that he has duly surrendered all his property and rights of property and has fully complied with all the requirements of said acts and of the orders of the court touching his said bankruptcy. should conclude with a prayer that he may be decreed by the court to have a full discharge from all debts provable against his estate under said bankrupt acts, except such debts as are excepted by law from such discharge. A person need not pray for a discharge from his firm debts in precise words, if he asks for a discharge from his provable debts; that virtually prays for a discharge from his partnership debts.<sup>5</sup> The petition should be dated and signed by the bankrupt. No verification is required.

A petition for discharge may be amended,<sup>6</sup> even after the discharge, as a bankrupt partner has been permitted to amend

<sup>&</sup>lt;sup>1</sup> B. A. 1898, Sec. 14. Compare R. S. Sec. 5108 to Sec. 5120.

<sup>&</sup>lt;sup>2</sup> In re Miller, 133 Fed. Rep. 1017, 13 Am. B. R. 345.

<sup>&</sup>lt;sup>3</sup> Official Form No. 57; see Form No. 153, post.

<sup>4</sup> General Ord. 31.

<sup>&</sup>lt;sup>5</sup> In re Pierson, No. 11153 Fed. Cas., 10 N. B. R. 107; as to partnership proceedings, see further Sec. 278, ante.

<sup>&</sup>lt;sup>6</sup> In re Samuel Gross, 5 Am. B. R. 271.

his petition for discharge to release firm debts as well as his individual debts long after his discharge was granted.<sup>7</sup>

## § 712. When and where the petition is filed.

Any person may, after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending; if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within but not after the expiration of the next six months.<sup>8</sup>

A petition filed more than twelve months and less than eighteen months after the adjudication will not be heard unless leave to file it has been granted by the court after hearing the reasons for delay, 10 ex parte and without notice to creditors, 11 and this leave will not be granted by a nunc pro tunc entry more than eighteen months after the adjudication. 12 If the court permits a petition to be filed after a year upon an insufficient showing, the remedy is a motion to vacate. 13 The

<sup>7</sup> In re Kaufman, 136 Fed. Rep. 262, 14 Am. B. R. 393.

But see *In re* Hawk (C. C. A. 8th Cir.), 114 Fed. Rep. 916, 8 Am. B. R. 71, denying application to set aside a discharge to allow an amendment to insert a creditor in schedules.

<sup>8</sup> B. A. 1898, Sec. 14a; In re Fahy, 116 Fed. Rep. 239, 8 Am. B. R. 354; In re Wagner, 139 Fed. Rep. 87, 15 Am. B. R. 100, court has no jurisdiction of petition filed after one year and six months.

The bankruptcy court can not open an adjudication entered on default so as to extend the time for application for a discharge. Re Morse, 168 Fed. Rep. 157, 21 Am. B. R. 709.

10 In re Knauer, 133 Fed. Rep. 805, 13 Am. B. R. 503; In re Lewin, 135 Fed. Rep. 252, 14 Am. B. R. 358; In re Anderson, 134 Fed. Rep. 319, 14 Am. B. R. 221. After a year has expired and the bankrupt petitions for extension of time, the petition requires no answer, but must be proved, and in the absence of proof application will be refused. Here referred to referee. In re Glickman & Pisnoff, 164 Fed. Rep. 209, 21 Am. B. R. 171.

<sup>11</sup> In re Fritz, 173 Fed. Rep. 560, 23 Am. B. R. 84.

<sup>12</sup> In re Wolff, 100 Fed. Rep. 430, 4 Am. B. R. 74.

<sup>13</sup> In re Haynes, 122 Fed. Rep. 560, 10 Am. B. R. 13.

petition should be filed in the clerk's office and not with the referee,<sup>14</sup> or with the judge.<sup>15</sup>

It will be observed that the time within which an application may be made is not dependent at all upon the progress made in the administration of the estate. Assets may or may not have come into the hands of the trustee. The estate may have been fully or partly distributed. It is immaterial whether any dividend has been declared or not.

In computing the time within which a petition for a discharge must be filed the number of days are computed by excluding the first and including the last, unless the last fall on a Sunday or holiday in which event the day last included shall be the next day thereafter which is not a Sunday or a legal holiday. The word "holiday" includes Christmas, the Fourth of July, the twenty-second of February, and any day appointed by the President of the United States or the Congress of the United States as a holiday or as a day of public fasting or thanksgiving. 17

A bankrupt is not entitled to file a second application for a discharge in the same proceeding when his first petition is denied after an investigation of its merits; 19 but the fact that a bankrupt has been refused a discharge does not prevent his obtaining one on again going through bankruptcy. 21

14 Watson v. McDuff (C. C. A.
 5th Cir.), 101 Fed. Rep. 241, 4 Am.
 B. R. 110.

<sup>15</sup> In re Sykes, 106 Fed. Rep. 669,
 6 Am. B. R. 264.

Under District Court rule 11 in bankruptcy in the Southern District of New York, which makes the office of the referee the office of the court, the filing of the petition for discharge with the referee is sufficient. *In re* Pincus, 147 Fed. Rep. 621, 17 Am. B. R. 331.

<sup>16</sup> B. A. 1898, Sec. 31; In re Holmes, 165 Fed. Rep. 225, 21 Am. B. R. 339.

<sup>17</sup> B. A. 1898, Sec. 1, clause 14.

19 In re Brockway, 23 Fed. Rep. 583, reviewing 12 Fed. Rep. 69; In re Fiegenbaum (C. C. A. 2d Cir.), 121 Fed. Rep. 69, 9 Am. B. R. 595; In re Royal, 113 Fed. Rep. 140, 7 Am. B. R. 636.

<sup>21</sup> In re Claff, 111 Fed. Rep. 506, 7 Am. B. R. 128; In re Herrman, 134 Fed. Rep. 566, 4 Am. B. R. 139. The discharge was denied on another ground later (C. C. A. 2d Cir.), 136 Fed. Rep. 767, 13 Am. B. R. 778.

As to the effect of a refusal of a discharge in a second proceeding, see Sec. 732.

#### § 713. Notice.

As soon as the petition is properly filed the court passes an order of notice.<sup>22</sup>

This order should fix the date that a hearing may be had upon the petition, and provide that notice be published in a certain designated newspaper 23 to all known creditors and all other persons in interest to appear at the said time and place to show cause, if any they have, why the prayer of the petitioner should not be granted. The order should also provide that the clerk send by mail to all known creditors copies of the petition and the order. All creditors, whether they have proved their claims or not, are entitled to have at least thirty days' notice by mail to their respective addresses as they appear in the list of the creditors, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing of the hearing upon the application for discharge of the bankrupt.24 If the creditors were not notified by mail it must appear that their addresses could not be obtained after due search, or the discharge will not be granted.<sup>25</sup> should be tested by the clerk and issued by him under the seal of the court. The clerk thereupon mails to each creditor and other party in interest a copy of the petition and the order and certifies that he has done so. This certificate of the clerk is sufficient evidence that the notices were duly mailed.26

A copy of the petition and order is also published in the newspaper, as directed by the order, and an affidavit to that effect, stating the days upon which it is so published, must be made and filed in the court. A copy of the printed

notice of the application for a discharge, and he was not listed in the bankrupt's schedule, and the clerk of courts certified that he had sent notice to all known creditors, but where notice was given by publication, the court refused to set aside the discharge. *In re* Fritz, 173 Fed. Rep. 560, 23 Am. B. R. 84.

<sup>. &</sup>lt;sup>22</sup> Official Form No. 57; see Form No. 153, post.

<sup>&</sup>lt;sup>28</sup> B. A. 1898, Sec. 28.

<sup>&</sup>lt;sup>24</sup> B. A. 1898, Sec. 58a, as amended June 25, 1910, 36 Stat. at L. 838.

 <sup>&</sup>lt;sup>25</sup> In re Dvorak, 107 Fed. Rep. 76,
 6 Am. B. R. 66.

<sup>&</sup>lt;sup>26</sup> In re Townsend, No. 14116 Fed. Cas., 2 Ben. 64. Where a receiver for a creditor claimed he had no

advertisement is usually attached to the affidavit. The affidavit is regularly made by the publisher or some person officially connected with the newspaper. Any person cognizant of the fact may make it.

## § 714. Who may oppose a discharge.

An application for a discharge may be opposed by any of the "parties in interest," <sup>28</sup> even a pauper in *forma pauperis*. <sup>29</sup> To entitle a party to oppose a discharge he must have a pecuniary interest in the matter, and that interest must be satisfactorily shown. <sup>30</sup>

A person has been held to have an interest sufficient to entitle him to oppose a discharge, where his claim was contingent and unliquidated so as not to be capable of being proved as a debt,<sup>31</sup> or where he held an equitable claim only against the estate,<sup>32</sup> or where his claim was being contested,<sup>33</sup> and although his claim has not been proved <sup>34</sup> or is no longer provable,<sup>35</sup> or where he is plaintiff in a suit against the bankrupt for contribution on a joint debt which he has paid.<sup>36</sup> The reason that such persons are parties in interest is that if a discharge is granted, the bankrupt may plead it in bar of their claims if asserted later. A creditor whose only debt is one not released by discharge,<sup>37</sup> or whose debt

<sup>28</sup> B. A. 1898, Sec. 14b.

<sup>29</sup> In re Guilbert, 154 Fed. 676, 18 A. B. R. 830.

<sup>30</sup> In re Servis, 140 Fed. Rep. 222, 15 Am. B. R. 271; In re Chandler (C. C. A. 7th Cir.), 138 Fed. Rep. 637, 14 Am. B. R. 512; In re Shepard, No. 12753 Fed. Cas., 1 N. B. R. 439; In re Smith, No. 12977 Fed. Cas., 8 Blatch. 461; In re Boutelle, No. 1705 Fed. Cas., 2 N. B. R. 129; In re Murdock, No. 9939 Fed. Cas., 1 Low. 362; Book's Case, No. 1637 Fed. Cas., 3 McLean, 317. <sup>31</sup> Ex parte Traphagen, No. 14140

Fed. Cas., 1 N. Y. Leg. Obs. 98.

32In re Tebbetts, No. 13817 Fed.
 Cas., 5 Law. Rep. 259.

<sup>33</sup> *In re* Belden, No. 1238 Fed. Cas., 4 Ben. 225.

<sup>34</sup> In re Frice, 96 Fed. Rep. 611,
2 Am. B. R. 674; In re Nathanson,
155 Fed. 645, 19 Am. B. R. 56; In re
Bimberg, 121 Fed. Rep. 942, 9 Am.
B. R. 601.

35 In re Bimberg, 121 Fed. Rep.942, 9 Am. B. R. 601.

<sup>36</sup> In re Conroy, 134 Fed. Rep. 764, 14 Am. B. R. 249.

<sup>87</sup> In re Servis, 140 Fed. Rep. 222,
 15 Am. B. R. 271. See also In re Maples, 105 Fed. Rep. 919, 5 Am. B. R. 426.

is barred by the statute of limitations,<sup>38</sup> or who has been paid in full,<sup>39</sup> has no such interest and therefore can not oppose the discharge.

A trustee has been permitted to file objections to the granting of a discharge to the bankrupt whose estate he is administering, 40 and the amendment of 1910 specifically authorizes him to appear and oppose the discharge on vote of the creditors. 41 The executor or administrator of a deceased creditor of the bankrupt may oppose his discharge.

It has been held that where a partnership which had proved a claim against a bankrupt estate was dissolved pending the proceedings, without any disposition of the claim being made as between the partners, no one could thereafter maintain objections to the bankrupt's discharge without showing affirmatively that all assented to the action. 42 If a creditor, who has duly filed specification of objection to the bankrupt's discharge, abandons it, the court in its discretion may permit other creditors to carry on the opposition, as if they had originally filed the specification. 48

## § 715. Estoppel to object to discharge.

A creditor may be barred from objecting to a discharge by laches,<sup>44</sup> or he may be estopped by his own consent to an

<sup>38</sup> In re Burk, No. 2156 Fed. Cas., Deady, 425.

<sup>39</sup> In re Harr, 143 Fed. Rep. 421, 16 Am. B. R. 213.

<sup>40</sup> In re Levey, 133 Fed. Rep. 572, 13 Am. B. R. 312,

<sup>41</sup> Statute June 25, 1910, Sec. 6, 36 Stat. at L. 838.

<sup>42</sup> In re Hendrick, 143 Fed. Rep. 647, 16 Am. B. R. 218.

43 In re Houghton, No. 6730 Fed. Cas., 10 N. B. R. 337; In re Sanborn, 131 Fed. Rep. 397, 12 Am. B. R. 428; In re Dietz, 97 Fed. Rep. 563, 3 Am. B. R. 316; In re Guilbert, 154 Fed. Rep. 676, 18 Am. B. R. 830.

In re Houghton, supra, Judge Lowell said: "I will not undertake at this time to lay down any rules for the application of this discretionary power. A great variety of circumstances may be found in the different cases. But it is obvious that among them may be the fact that the debtor has bought off the original objecting creditor after the time for filing specifications has passed; and this could not have been availed of before it occurred. No doubt many other cases may call for the exercise of the power."

44 Kentucky National Bank v. Carley (C. C. A. 3d Cir.), 121 Fed. Rep. 822, 10 Am. B. R. 375.

act from alleging it against his debtor on the question of his discharge.<sup>45</sup> The question of estoppel arose more frequently under the act of 1867, where fraudulent preferences barred a discharge, than it can under the present act. The question was frequently considered by the court under the former act.

The creditor's failure to object to the discharge does not bar his action for fraud after the discharge. 46

## § 716. Appearance to oppose a discharge.

A creditor intending to oppose an application for discharge may enter his appearance in person in his own behalf or by attorney, who must be an attorney or counsel authorized to practice in the district court. The name of the attorney or counselor, with his place of business, must be entered upon the docket, with the date of the entry. An appearance not duly authorized will be disregarded. The appearance should be filed with the clerk and not with the referee or sent to the judge. The appearance of the surface of the property of the surface of the surface

Upon the entry of appearance of a creditor or a party in interest to oppose a discharge all proceedings upon the petition are suspended until the specification of grounds in opposition to the discharge is filed.<sup>59</sup>

Unless an appearance is duly entered, the creditor has no standing in court as to the petition for discharge, and therefore can not be heard in opposition to it.<sup>47</sup> Where no entry

45 In re Sawyer, No. 12394 Fed. Cas., 2 Hask. 337; In re Schuyler, No. 12494 Fed. Cas., 2 Ben. 200; In re Kraft, 3 Fed. Rep. 892; Johnson v. Rogers, No. 7408 Fed. Cas., 15 N. B. R. 1; Judson v. The Courier Co., 8 Fed. Rep. 422.

<sup>46</sup> Standard Sewing Machine Co. v. Kattell, 132 N. Y. App. Div. 539, 117 N. Y. Suppl. 32.

<sup>56</sup> General Ord, 4. Creditors v.
 Williams, No. 3379 Fed. Cas., 4 N.
 B. R. 579; *In re* McVey, No. 8932
 Fed. Ças., 2 N. B. R. 257.

<sup>57</sup> In re Eidom, No. 4314 Fed. Cas., 3 N. B. R. 106; Creditors v. Williams, No. 8279 Fed. Cas., 4 N. B. R. 579.

Watson v. McDuff (C. C. A.
 5th Cir.), 101 Fed. Rep. 241, 4 Am.
 B. R. 410; In re Sykes, 106 Fed.
 Rep. 669, 6 Am. B. R. 264.

<sup>59</sup> In re Frizelle, No. 5132 Fed. Cas., 5 N. B. R. 119.

<sup>47</sup> In re McVey, No. 8932 Fed. Cas., 2 N. B. R. 257; In re Sutherland, No. 13640 Fed. Cas., Deady, 573; In re Smith, No. 12985 Fed.

of appearance is made within the time specified, or where it is not duly authorized, it should be disregarded and the cause should proceed as if no opposition had been made.

Where there is no entry of appearance by an opposing party the petition of a bankrupt to be discharged may be continued from time to time to suit the convenience of the bankrupt.<sup>48</sup>

#### § 717. When appearance may be entered.

An appearance is not regularly entered until after a petition for discharge is filed,<sup>49</sup> but it has been held that an appearance may be entered to oppose a discharge at any time before the expiration of the time limited by general order 32.<sup>50</sup> The former is the better practice. Manifestly a person should not put in a defense until it is called for, and it is not called for until a petition is filed. Before that time it is not known whether the bankrupt will apply for a discharge or not.

A creditor or other party in interest, who desires to oppose a discharge is required to enter his appearance in opposition thereto on the day when the creditors are required to show cause, and to file a specification in writing of the grounds of his opposition within ten days thereafter, unless the time shall be enlarged by special order of the judge. <sup>51</sup> It has been held that creditors may enter their appearance upon an adjourned day of the hearing on the order to show cause; <sup>52</sup> and also that the court may, in its discretion, enlarge the time for entering appearance and filing specifications in opposition to a

Cas., 5 N. B. R. 20; Creditors v. Williams, No. 3379 Fed. Cas., 4 N. B. R. 579; *In re* Buxbaum, No. 2259 Fed. Cas., 2 Hughes, 339.

<sup>48</sup> In re Sutherland, No. 13640 Fed. Cas., Deady, 573.

<sup>49</sup>In re McVey, No. 8932 Fed. Cas., 2 N. B. R. 257; In re Seabury, No. 12573 Fed. Cas., 10 N. B. R. 90.

50 In re Baum, No. 1116 Fed. Cas.,1 Ben. 274.

<sup>51</sup> General Ord. 32. In re Ginsberg, 130 Fed. Rep. 627, 12 Am. B.
R. 459; In re Grant, 135 Fed. Rep. 889, 14 Am. B. R. 398; In re Young, 162 Fed. 912, 20 Am. B. R. 697.

<sup>52</sup> In re Seabury, No. 12573 Fed. Cas., 10 N. B. R. 90; In re Tallmann, No. 13740 Fed. Cas., 2 Ben. 404.

But see *In re* Houghton, No. 6730 Fed. Cas., 2 Low. 328.

discharge as well after as before the expiration of the time allowed by the rule.<sup>53</sup>

Speaking of this question, Judge Lowell said: "I have decided in one case that the discretion of the court to enlarge the time extends to the time for appearance, as well as to that for filing the specification, and may be exercised after the time has expired, as well as before; but I do not think it can be laid down as a matter of law that the day when creditors are required to show cause means any day to which the proceedings may have been adjourned for other purposes. But I do think that the rule intends that the court shall have power to enlarge the time whenever there is good cause shown for it. The distinction is between an absolute right imposing a corresponding duty upon the court, and a discretionary power to be exercised only upon cause shown." <sup>54</sup>

A recent case holds that the court can enlarge the time, although the creditor's motion was not filed within ten days after the return day. The court remarks that frequently the examination of a bankrupt takes months and the court should not require a creditor to enter his appearance and specifications in opposition to a discharge before he has an opportunity to know whether he has reason for opposing the discharge. 55

## § 718. Specifications—Form and contents.

The specification must be in writing.<sup>60</sup> It must state the name of the opposing creditor.<sup>61</sup> It should show that the

<sup>53</sup> In re Levin, No. 8291 Fed. Cas., 7 Biss. 231; In re Filley, 2 Cent. L. J. 419. In this last case it appeared that the creditor had not received notice of the application for discharge.

But see Creditors v. Williams, No. 3379 Fed. Cas., 4 N. B. R. 579; In re Houghton, No. 6730 Fed. Cas., 2 Low. 328.

<sup>54</sup> In re Houghton, No. 6730 Fed. Cas., 2 Low. 328. See also *In re* Ginsburg, 130 Fed. Rep. 627, 12 Am. B. R. 459; *In re* Grant, 135 Fed. Rep. 889, 14 Am. B. R. 398.

<sup>55</sup> In re Levin (C. C. A. 1st Cir.), 176 Fed. Rep. 177, 99 C. C. A. 531, 23 Am. B. R. 845.

60 General Ord. 32.

<sup>61</sup> Official Form No. 58; see Form No. 157, post; In re Shoemaker, No. 12799 Fed. Cas., 4 Biss. 245, it was held that "A. and B., attorneys

person objecting is a party in interest. The statement that he is a creditor whose debt will be released by a discharge is sufficient. The mere statement that he is trustee of the estate is not sufficient. The specification should then state the grounds of opposition specifically. 63

The object of the specification of grounds of opposition to a petition for discharge is to give the bankrupt reasonable notice of what is expected to be proved against him and to advise the court of the issue to be tried. The allegations must be averments of fact and not conclusions of law, 64 and it is not enough merely to follow the words of the act 66 except as to the charge of failure to keep books of account. 68

Where the ground of objection is the commission of an offense or crime under the act, it is insufficient to charge the offense in the words of the statute, but the specification

for opposing creditors," was not sufficient. *In re* Glass, 119 Fed. Rep. 509, 9 Am. B. R. 391.

62 In re Levey, 133 Fed. Rep. 572,
 13 Am. B. R. 312, but compare the statute of June 25, 1910, Sec. 6.

68 In re Isaac Wolfensohn, 5 Am. B. R. 60

64 In re Hirsch, 96 Fed. Rep. 468, 2 Am. B. R. 715; In re Steed, 107 Fed. Rep. 682, 6 Am. B. R. 73; In re Servis, 140 Fed. Rep. 222, 15 Am. B. R. 271; In re Chandler (C. C. A. 7th Cir.), 138 Fed. Rep. 637, 14 Am. B. R. 512; In re Goodale, 109 Fed. Rep. 783, 6 Am. B. R. 493; In re Peck, 120 Fed. Rep. 972, 9 Am. B. R. 747; In re Parish, 122 Fed. Rep. 553, 10 Am. B. R. 548; In re Gift, 130 Fed. Rep. 230, 12 Am. B. R. 244; In re Brockman, 168 Fed. Rep. 1015, 21 Am. B. R. 251. A statement that the bankrupt failed to show what he had done with money which he alleged to have borrowed from his sister-inlaw, A. R. R., is a sufficient specification. *In re* Randall, 159 Fed. Rep. 298, 20 Am. B. R. 305.

The rule is that the facts relied on to prevent a discharge "must be pleaded with sufficient certainty of detail as to apprise the bankrupt of the charge he has to meet and to enable the court to understand the issue to be examined and determined by it." Remmers v. Merchants'-Laclede Nat. Bank (C. C. A. 8th Cir.), 173 Fed. Rep. 484, 97 C. C. A. 490, 23 Am. B. R. 78.

66 In re Bromley, 152 Fed. Rep.493, 18 Am. B. R. 227.

68 In re Randall, 159 Fed. Rep.
298, 20 Am. B. R. 305; In re Ginsburg, 130 Fed. Rep. 627, 12 Am. B.
R. 459; In re Patterson, 121 Fed.
Rep. 921, 10 Am. B. R. 371; In re
Levey, 133 Fed. Rep. 572, 576, 13
Am. B. R. 312; Godshalk v. Sterling (C. C. A. 3d Cir.), 129 Fed.
Rep. 580, 12 Am. B. R. 302.

must state facts showing the commission of the offense or crime with substantially the same particularity and exactness required in a criminal information or an indictment.<sup>69</sup> The acts set out must be charged to have been "knowingly and fraudulently" done.<sup>70</sup>

Where the ground of objection is the concealment of property the specification must describe the property, name the person holding the title, state the time of transfer and other facts necessary to identify the transaction.<sup>71</sup>

Where the ground of objection is the making of a false oath, the account or the testimony alleged to be false must be specifically pointed out together with the facts relied upon to prove its falsity.<sup>72</sup>

<sup>69</sup> In re Hirsch, 96 Fed. Rep. 468, 2 Am. B. R. 715; In re Kaiser, 99 Fed. Rep. 689, 3 Am. B. R. 767; In re Mudd, 105 Fed. Rep. 348, 5 Am. B. R. 242. See In re Bromley, 152 Fed. Rep. 493, 18 Am. B. R. 227. <sup>70</sup> In re Patterson, 121 Fed. Rep. 921, 10 Am. B. R. 371; In re Blalock, 118 Fed. Rep. 679, 9 Am. B. R. 266; In re Mudd, 105 Fed. Rep. 348, 5 Am. B. R. 242; In re Pierce, 103 Fed. Rep. 64, 4 Am. B. R. 554; In re Adams, 104 Fed. Rep. 72, 4 Am. B. R. 696.

71 In re Parish, 122 Fed. Rep. 533, 10 Am. B. R. 548; In re Ginsburg, 130 Fed. Rep. 627, 12 Am. B. R. 459; In re Mudd, 105 Fed. Rep. 348, 5 Am. B. R. 242; In re Milgraum & Ost, 129 Fed. Rep. 827, 12 Am. B. R. 306; In re Gift, 130 Fed. Rep. 230, 12 Am. B. R. 244; In re Knaszak, 151 Fed. Rep. 503, 18 Am. B. R. 187; See In re Griffin Bros., 154 Fed. Rep. 537, 19 Am. B. R. 78; In re Nathanson, 155 Fed. Rep. 645, 19 Am. B. R. 56; In re McCann Bros., 171 Fed. Rep. 266, 22 Am. B. R. 557.

72 In re Ginsburg, 130 Fed. Rep.

627, 12 Am. B. R. 459; In re Goodale, 109 Fed. Rep. 783, 6 Am. B. R. 493; Troeder v. Lorsch, 150 Fed. Rep. 710, 80 C. C. A. 376, 17 Am. B. R. 723; In re McCann Bros., 171 Fed. Rep. 266, 22 Am. B. R. 557. See In re Nathanson, 155 Fed. Rep. 645, 19 Am. B. R. 56.

A specification of objection to the discharge of the bankrupt is sufficient which alleges that the bankrupt verified his schedule omitted certain stock and knowingly and with fraudulent intent made a false oath in verifying his schedule, and the fact that the obiection contains immaterial matter besides does not make it insufficient. Remmers v. Merchants-Laclede National Bank of St. Louis (C. C. A. 8th Cir.), 173 Fed. Rep. 484, 97 C. C. A. 490, 23 Am. B. R. 78. A statement that the testimony of the bankrupt is inconsistent and contradictory is not only consonant with the innocence of the bankrupt, but is characteristic of most testimony of any length whatever. In re McCarthy, 170 Fed. Rep. 859, 22 Am. B. R. 499.

When it is alleged that the bankrupt has obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit, not only must the false rep-' resentation be set out, but the name of the person so alleged to have been defrauded must be given.<sup>76</sup>

The specification must be signed by the party in interest who is opposing the discharge.<sup>77</sup> It must be verified by affidavit of the party in interest,<sup>78</sup> or his agent or attorney who has knowledge of the facts stated in the petition.<sup>79</sup>

Where the verification is by attorney it should explain why the oath was not made by the creditor himself.<sup>81</sup> An affidavit on information and belief has been held sufficient.<sup>82</sup> But it is better to have the affidavit positive in its terms.<sup>83</sup> If no exception is taken to a defect, it will be considered waived.<sup>84</sup>

<sup>76</sup> Godshalk v. Sterling (C. C. A. 3d Cir.), 129 Fed. Rep. 580, 12 Am. B. R. 302.

<sup>77</sup> Official Form No. 58; see Form No. 157, *post; In re* Glass, 119 Fed. Rep. 509, 520, 9 Am. B. R. 391, 405.

Ted. Rep. 49, 7 Am. B.
R. 252; In re Glass, 119 Fed. Rep. 509, 9 Am. B. R. 391; In re Baerncopf, 117 Fed. Rep. 975, 9 Am. B. R. 133; In re Meurer, 144, Fed. Rep. 445, 15 Am. B. R. 823; In re Gift, 130 Fed. Rep. 230, 12 Am. B. R. 244.

But see *In re* Jamieson, 120 Fed. Rep. 697, 9 Am. B. R. 681; see *In re* Nathanson, 155 Fed. Rep. 645, 19 Am. B. R. 56.

79 In re Peck, 120 Fed. Rep. 972,
9 Am. B. R. 747; In re Milgraum & Ost, 129 Fed. Rep. 827, 12 Am. B. R. 306.

But see *In re* Glass, 119 Fed. Rep. 520, 9 Am. B. R. 391.

Specifications of objections to a bankrupt's discharge filed by a number of creditors but signed and verified by an agent of one of them may be amended so as to permit another creditor to sign and verify them. *Re* Hanna (C. C. A. 2d Cir.), 168 Fed. Rep. 238, 93 C. C. A. 452, 21 Am. B. R. 843.

<sup>81</sup> In re Randall, 159 Fed. Rep. 298, 20 Am. B. R. 305.

82 In re Milgraum & Ost, 129 Fed.Rep. 827, 12 Am. B. R. 306.

88 In re Glass, 119 Fed. Rep. 520,
9 Am. B. R. 391; In re Peck, 120
Fed. Rep. 972, 9 Am. B. R. 747;
In re Brown (C. C. A. 5th Cir.),
112 Fed. Rep. 49, 7 Am. B. R. 252.
84 In re Robinson, 123 Fed. Rep.
844, 10 Am. B. R. 477; Godshalk v.

844, 10 Am. B. R. 477; Godshalk v. Sterling (C. C. A. 3d Cir.), 129 Fed. Rep. 580, 12 Am. B. R. 302.

#### § 719. Amendment of specifications.

If the specifications are defective either in form or in substance they may be amended by leave of the court, 85 even after the expiration of the ten days allowed for filing. 87 Application to amend should be made to the judge. 88

Whether or not this leave shall be granted is within the discretion of the court and the question of whether or not this discretion was abused is one on which the circuit court of appeals can exercise its power of revision under Section -24b.89 Before the hearing the court should be very liberal in granting leave to amend specifications,90 but after issue joined and the case is argued amendment will not be allowed.91 In one case amendment was allowed after the evidence was in where it would not present any new issue.92 In amending specifications the objectors will not be permitted to change the substantial nature of their objections after the time allowed for filing objections.98 The specifica-

85 In re Peck, 120 Fed. Rep. 972.
9 Am. B. R. 747; In re Parish, 122
Fed. Rep. 553, 10 Am. B. R. 548;
In re Gift, 130 Fed. Rep. 230, 12
Am. B. R. 244; In re Knaszak, 151
Fed. Rep. 503, 18 Am. B. R. 187;
In re Wittenberg, 160 Fed. 991, 20
Am. B. R. 398 (vague specifications).

A defect in verifying a specification may be cured by amendment. In re Meurer, 144 Fed. Rep. 445, 15 Am. B. R. 823 (within five days).

87 In re Nathanson, 18 Am. B. R. 252.

<sup>88</sup> In re Kaiser, 99 Fed. Rep. 689,3 Am. B. R. 767.

89 In re Carley (C. C. A. 3d Cir.),
117 Fed. Rep. 130, 8 Am. B. R.
720; In re Brown (C. C. A. 5th Cir.),
112 Fed. Rep. 49,
12 Am. B.
R. 252.

90 In re Glass, 119 Fed. Rep. 509,
 9 Am. B. R. 391; In re Carley (C.

C. A. 3d Cir.), 117 Fed. Rep. 130, 8 Am. B. R. 720; In re Morgan, 101 Fed. Rep. 982, 4 Am. B. R. 402; In re Kaiser, 99 Fed. Rep. 689, 3 Am. B. R. 767; In re Frice, 96 Fed. Rep. 611, 2 Am. B. R. 674; In re Hirsch, 96 Fed. Rep. 468, 471, 2 Am. B. R. 715, 718; In re Hixon, 93 Fed. Rep. 440, 1 Am. B. R. 610; In re Holman, 92 Fed. Rep. 512, 1 Am. B. R. 600.

' Amendment was not allowed in In re Mudd, 105 Fed. Rep. 348, 5 Am. B. R. 242; In re Peck, 120 Fed. Rep. 972, 9 Am. B. R. 747.

91 In re Smith, 16 Fed. Rep. 465,
 467; In re Graves, 24 Fed. Rep. 550.
 92 In re Pierce, 103 Fed. Rep. 64,
 4 Am. B. R. 554.

98 In re Gift, 130 Fed. Rep. 230,
12 Am. B. R. 244; In re Hendrick,
138 Fed. Rep. 473, 14 Am. B. R.
795; In re Peck, 120 Fed. Rep. 972,
9 Am. B. R. 747; In re Mercur

tion as amended should only amount to an enlargement of the original, and amendment may be denied where only the words of the bankruptcy act are used in the original specifications.<sup>94</sup>

#### § 720. When and where specifications filed.

Where an opposing creditor or other party in interest has entered his appearance in opposition to a discharge upon the day when creditors are required to show cause, he must file a specification in writing of the grounds of his opposition within ten days thereafter, unless the time shall be enlarged by special order of the judge. If the specification is not filed within the prescribed time it can not be considered. Where a creditor has duly entered his appearance, and through inadvertence fails to file a specification within the prescribed time, he may, on showing proper cause, be allowed to file it nunc pro tunc. Where the specification is not filed within the time, and the time for filing it is not extended, the cause progresses as though there were no opposition. Specifications should be filed with the clerk and not with the referee or judge.

#### § 721. Pleading to a specification.

Although a petition for a discharge is filed and the opposition to it is made in the bankruptcy proceedings, the specification of grounds in opposition to the discharge is in the nature of a new suit. It calls for pleas, proofs and a hearing

(C. C. A. 3d Cir.), 122 Fed. Rep. 384, 10 Am. B. R. 505, affirming 116 Fed. Rep. 655, 8 Am. B. R. 275.

<sup>94</sup> In re Bromley, 152 Fed. 493, 18 Am. B. R. 227.

95 General Ord. 32. The extension can be made after the expiration of the ten days' period. *In re* Levin (C. C. A. 1st Cir.), 176 Fed. Rep. 177, 99 C. C. A. 531, 23 Am. B. R. 845.

<sup>97</sup> In re Albrecht, 104 Fed. Rep. 974, 5 Am. B. R. 223; In re Cloth-

ier, 108 Fed. Rep. 199, 6 Am. B. R.203; In re. McVey, No. 8932 Fed.Cas., 2 N. B. R. 257.

98 In re Grefe, No. 5794 Fed. Cas.,2 N. B. R. 329.

<sup>99</sup> In re McVey, No. 8932 Fed. Cas., 2 N. B. R. 257; Creditors v. Williams, No. 3379 Fed. Cas., 4 N. B. R. 579.

100 Watson v. McDuff (C. C. A.
5th Cir.), 101 Fed. Rep. 241, 4 Am.
B. R. 410; *In re* Sykes, 106 Fed.
Rep. 669, 6 Am. B. R. 264.

or trial.<sup>1</sup> If, however, the bankrupt does not plead to the specifications the bankrupt will not be denied a discharge without proof by the opposing creditor.<sup>2</sup>

Where the allegations of the specification are vague and general he may move to have them stricken out,<sup>3</sup> or he may rely upon this defense at the time of the hearing, for the court will disregard vague and general allegations.<sup>4</sup> If the allegations are insufficient in law he may file exceptions to them analogous to those allowed in equity,<sup>5</sup> or he may demur.<sup>6</sup>

All objections to specifications for formal defects must be raised before the issue is tried or the defect is waived,<sup>7</sup> but where the specifications state nothing which by any con-

<sup>1</sup> B. A. 1898, Sec. 14; *In re* Hendrick, 138 Fed. Rep. 473, 14 Am. B. R. 795.

In *In re* Prager & Son, 134 Fed. Rep. 1006, 13 Am. B. R. 527, the court says: "The opposition to the discharge is always in the nature of a new suit. It requires proofs of the grounds set out in the specifications in opposition to the discharge."

<sup>2</sup> In re Crist, 116 Fed. Rep. 1007, 9 Am. B. R. 1; In re Logan, 102 Fed. Rep. 876, 4 Am. B. R. 525; In re Hendrick, 138 Fed. Rep. 473, 14 Am. B. R. 795.

<sup>3</sup> In re Waggoner, No. 17037 Fed. Cas., 1 Ben. 532; In re Crist, 116 Fed. Rep. 1007, 9 Am. B. R. 1.

<sup>4</sup> In re Peck, 120 Fed. Rep. 972, 9 Am. B. R. 747; In re Goodale, 109 Fed. Rep. 783, 6 Am. B. R. 493; In re Steed, 107 Fed. Rep. 682, 6 Am. B. R. 73; In re Parish, 122 Fed. Rep. 553, 10 Am. B. R. 548; In re Hendrick, 138 Fed. Rep. 473, 14 Am. B. R. 795; In re Crist, 116 Fed. Rep. 1007, 9 Am. B. R. 1; In re Rathbone, No. 11580 Fed. Cas., 2 Ben. 138; In re Hansen, No. 6039

Fed. Cas., 2 N. B. R. 211; In re Dreyer, No. 4082 Fed. Cas., 2 N. B. R. 212; In re Son, No. 13174 Fed. Cas., 2 Ben. 153; In re Tyrrel, No. 14314 Fed. Cas., 2 N. B. R. 200; In re McCarthy, 170 Fed. Rep. 859, 22 Am. B. R. 499.

In re Rosenfield, No. 12057 Fed;
Cas., 2 N. B. R. 116; In re Baerncopf, 117 Fed. Rep. 975, 9 Am. B.
R. 133; In re Robinson, 123 Fed.
Rep. 844, 10 Am. B. R. 477.

6 In re Crist, 116 Fed. Rep. 1007,
9 Am. B. R. 1; In re Levey, 133
Fed. Rep. 572, 13 Am. B. R. 312;
In re Burk, No. 2156 Fed. Cas.,
Deady, 425; In re McVey, No. 8932
Fed. Cas., 2 N. B. R. 257; In re Adams, 171 Fed. Rep. 599, 22 Am. B.
R. 613.

<sup>7</sup> In re Baldwin, 119 Fed. Rep. 796, 9 Am. B. R. 591; In re Baerncopf, 117 Fed. Rep. 975, 9 Am. B. R. 133; In re Robinson, 123 Fed. Rep. 844, 10 Am. B. R. 477; In re Scott, 126 Fed. Rep. 981, 11 Am. B. R. 327. In the northern district of New York this should be done by motion. In re Baldwin, supra. See In re McCarthy, 170 Fed. Rep.

struction whatever comes within the statute a failure to except or otherwise plead is not a waiver of the defect.8 Where the bankrupt desires to make a general defense, as by confession and avoidance, or otherwise, he may do so by answer.

When a bankrupt has been allowed to file his petition for discharge more than a year after adjudication, insufficient grounds for the delay should be seasonably set up by motion to vacate.9

## § 722. Want of jurisdiction a ground for opposing discharge.

Another ground for contesting a discharge, recognized by the courts, is that the court has never acquired jurisdiction of the proceedings, although it may have made many orders therein.

A court will not acquire jurisdiction where at the time of filing the petition the bankrupt had not resided or had a domicile or a place of business within the district for the length of time prescribed by the statute, or where any jurisdictional requirement is wanting. This objection can not be raised upon an application for a discharge when the record on its face shows jurisdiction.<sup>10</sup> The truth of jurisdictional averments in the petition must be contested at the time of the adjudication or jurisdiction will be conclusively presumed and a discharge granted.

## § 723. Statutory grounds.

As the proceedings in bankruptcy are strictly statutory, a discharge can be refused only upon a ground specifically set forth in the statute,11 except the want of jurisdiction of the court to entertain the proceedings.

859, 22 Am. B. R. 499. See In re Brockman, 168 Fed. Rep. 101, 21 Am. B. R. 251,

<sup>8</sup> In re McCarthy, 170 Fed. Rep. 859, 22 Am. B. R. 499; In re Servis, 140 Fed. Rep. 222; 15 Am. B. R. 271. 9 In re Haynes & Sons, 122 Fed.

Rep. 560, 10 Am. B. R. 13.

10 In re Mason, 99 Fed. Rep. 256, 3 Am. B. R. 599; In re Clisdell, 101 Fed. Rep. 246, 4 Am. B. R. 95; In re Goodale, 109 Fed. Rep. 783, 6 Am. B. R. 493.

11 B. A. 1898, Sec. 14b; In re Blalock, 118 Fed. Rep. 679, 9 Am. B. R. 266; In re McCarty, 111 Fed. A discharge will not be refused merely because the name of the bankrupt is misspelled in the advertisement of the first meeting of his creditors, 12 or on account of mere dissipation of waste of assets. 13

#### § 724. History of statutory grounds.

Under the act of 1867 the cases in which no discharge could be granted were collated in ten separate paragraphs. <sup>14</sup> The bill, which afterwards became the present bankrupt act, contained nine distinct classes of cases in which no discharge could be granted. <sup>15</sup> These grounds remained in the bill until its final revision by the conference committee. The

Rep. 151, 7 Am. B. R. 40; In re Howden, 111 Fed. Rep. 723, 7 Am. B. R. 191; In re Marshall Paper Co. (C. C. A. 1st Cir.), 102 Fed. Rep. 872, 4 Am. B. R. 468; In re Peacock, 101 Fed. Rep. 560, 4 Am. B. R. 136; In re Parish, 122 Fed. Rep. 553, 10 Am. B. R. 548; In re Schenck, 116 Fed. Rep. 554, 8 Am. B. R. 727; In re Walther, 95 Fed. Rep. 941, 2 Am. B. R. 702; and In re Fleishman, 120 Fed. Rep. 960, 9 Am. B. R. 557, seem to deny a discharge where the statute does not authorize it; In re Griffin Bros., 154 Fed. Rep. 557, 19 Am. B. R. 78.

12 In re Elkind (C. C. A. 2d Cir.), 175 Fed. Rep. 64, 23 Am. B. R. 166.

13 It is no ground for refusing a discharge that eleven months before the filing of his petition in bankruptcy the bankrupt made a general assignment to his creditors of what he then thought was sufficient to pay off his debts, saving \$1,000 inherited from his father's estate, and started on several months' travel and dissipation, completely ignoring his business. In re Boner, 169 Fed. Rep. 727, 22 Am. B. R. 151.

14 R. S. Sec. 5110.

15 The bill provided that the bankrupt should be discharged "unlesshe has (1) been convicted of having committed an offense punishable by imprisonment as herein provided; (2) given a preference as herein defined, and within six months prior to the filing of the petition against him, which has not been surrendered to the trustee; (3) obtained property upon credit which has not been paid for or stored at the time the petition is filed against him upon a materially false statement in writing made by him to any person for the purpose of obtaining credit or of being communicated to the trade or to the person from whom he obtained such property on credit; (4) made a transfer of any of his property which any creditor who has proved his claim in the proceedings might, at the time of the filing of the petition, have impeached as fraudulent if he had then been a judgment creditor, unless such property shall have been surrendered to the trustee; or (5) with fraudulent intent and in contemplation of bankruptcy, destroyed or neglected to keep books of account or records from which his bill was materially changed by the conference committee in this respect. <sup>16</sup> Many of the grounds were stricken out.

Before the amendment of February 5, 1903, there were two general grounds only for contesting the discharge of a bankrupt in the present statute. They were that the bankrupt has (1) committed an offense punishable by imprisonment as herein provided; or (2) with fraudulent intent to conceal his true financial condition, and in contemplation of bankruptcy, destroyed, concealed or failed to keep books of account or records from which his true condition might be ascertained.<sup>17</sup>

The statute as it existed prior to February 5, 1903, applies to all cases in which the proceedings were begun before that time. By that amendment the second ground was changed to read "with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained," and the following grounds were added: 18 obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit; 19 or, at any time sub-

true condition might be ascertained; or (6) made a substantially false valuation, as a bankrupt, of any of the property of his estate in his schedule of property, or intentionally omitted therefrom any of the property of his estate, or from the list of his creditors any person to whom he is indebted in a substantial amount, or included therein any person to whom he is not indebted, or included therein a creditor for an amount substantially more than the true indebtedness, or (7) secreted or conveyed any of his property to avoid its being administered in bankruptcy, or any document relating to his property in contemplation of bank-

ruptcy; or (8) transferred any property otherwise than in the ordinary course of his business, in contemplation of bankruptcy; or (9) in case of any person having, to his knowledge, after he has become a bankrupt, proved a false claim against his estate, failed to disclose that fact, within one month after coming to a knowledge thereof, to his trustee."

<sup>16</sup> 31 Cong. Rec. 7205.

<sup>17</sup> B. A. 1898, Sec. 14b. See Secs. 725 to 728, post.

18 32 Stat. at L. 797.

See Sec. 730, post; In re Ives,
 No. 7115 Fed. Cas., 5 Dill. 146; In re Goodale, 109 Fed. Rep. 783, 6
 Am. B. R. 493; In re Clisdell, 101

sequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed any of his property with intent to hinder, delay, or defraud his creditors; <sup>20</sup> or, in voluntary proceedings been granted a discharge in bankruptcy within six years; <sup>21</sup> or in the course of the proceedings in bankruptcy refused to obey any lawful order of or to answer any material question approved by the court. <sup>22</sup>

#### § 725. Bankrupt is guilty of an offense.

The court will refuse the application for a discharge when the bankrupt has committed an offense under the statute punishable by imprisonment,<sup>23</sup> but not on account of larceny committed before the petition was filed.<sup>24</sup>

Offenses under the act are: When a person has knowingly and fraudulently, first, concealed, while a bankrupt, from his trustee any of the property belonging to his estate in bankruptcy; or, second, made a false oath or account in, or in relation to, any proceeding in bankruptcy; or, third, presented under oath any false claim for proof against the estate of a bankrupt, or used any such claim in composition, personally or by agent, proxy, or attorney, or as agent, proxy, or attorney; or, fourth, received any material amount of property from a bankrupt after the filing of the petition, with intent to defeat the act; or, fifth, extorted or attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings.<sup>25</sup>

What acts are necessary to constitute each of these offenses is considered elsewhere and need not be repeated here.<sup>26</sup>

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Fed. Rep. 246, 4 Am. B. R. 95; In re Mason, 99 Fed. Rep. 256, 3 Am. B. R. 599.
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<sup>20</sup> See Sec. 731, post.

<sup>&</sup>lt;sup>21</sup> See Sec. 732, post.

<sup>22</sup> See Sec. 733, post.

<sup>&</sup>lt;sup>23</sup> B. A. 1898, Sec. 14b (1).

<sup>&</sup>lt;sup>24</sup> In re Wolf, 159 Fed. Rep. 299, 20 Am. B. R. 304.

<sup>&</sup>lt;sup>25</sup> B. A. 1898, Sec. 29b. See also Offens'es, Chap. XXXIII, ante.

<sup>&</sup>lt;sup>26</sup> Secs. 650 to 657, ante.

A willful perjury of the bankrupt in his examination in the proceedings for his discharge is no ground for depriving him of the discharge itself, and in such a case the bankrupt may be punished for contempt by a term in jail conditioned on his setting up his discharge as a bar to the creditor's claim.<sup>27</sup>

It is not necessary that a bankrupt shall have been convicted of the offense as a foundation for refusing the discharge. If he has been guilty of an offense he can not be discharged, although from difficulties in proof, placed in the way by statute, he can not be convicted of the offense in a criminal prosecution,<sup>28</sup> although where the validity of a transaction alleged to be a fraudulent concealment is in litigation no discharge will be granted until its validity has been decided.<sup>29</sup>

The proceeding for a discharge is not a criminal proceeding.<sup>30</sup> The burden of proof is on the objecting creditor to establish by clear and convincing evidence that the bankrupt has committed the offense under the act in order to defeat his discharge.<sup>31</sup> While the objecting party has the burden of the proof, he is not required to prove the commission of the offense alleged beyond a reasonable doubt, a fair preponderance of evidence is sufficient.<sup>32</sup>

27 In re Kretsch, 172 Fed. Rep.523, 22 Am. B. R. 284.

<sup>28</sup> In re Gaylord (C. C. A. 2d Cir.), 112 Fed. Rep. 668, 7 Am. B. R. I; In re Dow's Estate, 105 Fed. Rep. 889, 5 Am. B. R. 1400; In re Goodale, 109 Fed. Rep. 783, 6 Am. B. R. 493; In re Leslie, 119 Fed. Rep. 406, 9 Am. B. R. 561; contra, In re Marx, 102 Fed. Rep. 676, 4 Am. B. R. 521.

<sup>29</sup> In re Clansky, 163 Fed. Rep. 428, 20 Am. B. R. 780.

80 In re Gaylord (C. C. A. 2d
Cir.), 112 Fed. Rep. 668, 7 Am.
B. R. 1; In re Dauchy, 122 Fed.
Rep. 688, 10 Am. B. R. 527.

31 In re Keefer, 135 Fed. Rep.

885, 14 Am. B. R. 290; In re Gaylord (C. C. A. 2d Cir.), 112 Fed. Rep. 668, 7 Am. B. R. 1; In re Dauchy, 122 Fed. Rep. 688, 10 Am. B. R. 527; In re Howden, 111 Fed. Rep. 723, 7 Am. B. R. 191; In re Jacobs, 144 Fed. Rep. 868, 16 Am. B. R. 482; In re Kolster, 17 Am. B. R. 52; In re Herman Boasberg, 1 Am. B. R. 353; In re George F. Schreck, 1 Am. B. R. 366.

32 In re Gaylord (C. C. A. 2d Cir.), 112 Fed. Rep. 668, 7 Am. B. R. 1; In re Leslie, 119 Fed. Rep. 406, 9 Am. B. R. 561; In re Dauchy, 122 Fed. Rep. 688, 10 Am. B. R. 527; In re Hamilton, 133 Fed. Rep. 823, 13 Am. B. R. 333; In re How-

## § 726. Defeating bankruptcy act—Collusion.33

A discharge will be refused where the bankrupt purchases the claim of a creditor to secure a withdrawal of his objections to the discharge,<sup>34</sup> although it may not necessarily be wrongful to buy off a creditor where there is no claim that the creditor received money directly from the bankrupt.<sup>35</sup>

# § 727. Destroyed, concealed or failed to keep books.

The bankrupt should not be granted a discharge in proceedings begun since February 5, 1903, when he has, with intent to conceal his financial condition, destroyed, 'concealed, or failed to keep books of account or records from which such condition might be ascertained.<sup>36</sup>

In order to prevent a discharge under this provision two things must concur. First, the bankrupt must have destroyed, concealed, or failed to have kept books of account or records from which his financial condition might be ascertained. Second, he must have done this with intent to conceal his financial condition.

The original bankrupt act contained the word "fraudulent" before intent and also a third element, namely, that he must have destroyed or concealed or failed to keep books of ac-

den, 111 Fed. Rep. 723, 7 Am. B. R. 191; In re Delmour, 161 Fed. Rep. 589, 20 Am. B. R. 405. See In re Countryman, 119 Fed. Rep. 637, 9 Am. B. R. 572, must be clear proof.

The contention that proof of false oath to oppose a discharge in bankruptcy must be of that high degree required to support a conviction against him on a charge of perjury, is not sustained, but it is necessary to offer such clear and convincing proofs as will overcome the presumption that men are honest, and that their acts were

prompted by an honest purpose. Remmers v. Merchants-Laclede Nat. Bank of St. Louis (C. C. A. 8th Cir.), 173 Fed. Rep. 484, 97 C. C. A. 490, 23 Am. B. R. 78.

33 Agreement to stifle prosecution, see Sec. 656.

34 In re Steindler & Hahn, 5 Am.
B. R. 63 (referee); In re Luftig, 162
Fed. Rep. 322, 15 Am. B. R. 773.

<sup>35</sup> In re Luftig, 162 Fed. Rep. 322, 15 Am. B. R. 773.

<sup>36</sup> B. A. 1898, Sec. 14b, clause 2,
as amended February 5, 1903, 32
Stat. at L. 797.

count in contemplation of bankruptcy.<sup>37</sup> The words "in contemplation of bankruptcy" did not mean "in contemplation of insolvency"—or a simple inability to pay as debts should become due and payable—but meant that the debtor must contemplate the commission of what was declared by the act to be an act of bankruptcy, or must have contemplated an application by himself to be declared a bankrupt.<sup>38</sup>

A failure to keep the books before the passage of the bankruptcy act is no bar to the discharge.<sup>39</sup>

## § 728. What is failure to keep books.

It is essential to prevent a discharge that the bankrupt has destroyed, concealed or failed to have kept books of account or records from which his financial condition might be ascertained.<sup>40</sup>

The absence of books of account and records must be due to the acts of the bankrupt. He will not be required to abide the consequences of the acts of other persons, if innocent himself. The mere fact that such books do not come into the possession of the trustee is not sufficient to prevent a discharge,<sup>41</sup> unless the bankrupt is chargeable for their disappearance.<sup>42</sup>

87 B. A. 1898, Sec. 14b. Van Ingen
v. Schophofen (C. C. A. 8th Cir.),
129 Fed. Rep. 352, 12 Am. B. R.
24; In re Idzall, 96 Fed. Rep. 314,
2 Am. B. R. 741; In re Carmichael,
96 Fed. Rep. 594, 2 Am. B. R. 815;
In re Blalock, 118 Fed. Rep. 679,
9 Am. B. R. 266; In re Spear, 103
Fed. Rep. 779, 4 Am. B. R. 617; In
re Brice, 102 Fed. Rep. 114, 4 Am.
B. R. 355.

88 Buckingham v. McLean, 13
How. 168, 14 L. Ed. 91; In re Marx, 102 Fed. Rep. 676, 4 Am. B.
R. 521; In re Kenyon, 112 Fed. Rep. 658, 7 Am. B. R. 527; Van Ingen v. Schophofen (C. C. A. 8th Cir.), 129 Fed. Rep. 352, 12 Am. B. R. 24.

<sup>87</sup> B. A. 1898, Sec. 14b; Van Ingen 90, 2 Am. B. R. 165, though fraudulent intent appeared; *In re* Matthew McNamara, 2 Am. B. R. 566; *In re* Shertzer, 3 Am. B. R. 699; *In re* Lieber, 3 Am. B. R. 217. <sup>40</sup> B. A. 1898, Sec. 14b, as amended Feb. 5, 1903, 32 Stat. at L. 797.

41 In re Eades (C. C. A. 7th Cir.),
143 Fed. Rep. 293, 16 Am. B. R. 30.
42 Ablowich v. Stursberg (C. C. A. 2d Cir.), 105 Fed. Rep. 751, 5
Am. B. R. 403, affirming 3 Am. B.
R. 586; In re Mendelsohn, 102 Fed.
Rep. 119, 4 Am. B. R. 103; In re
Morgan, 101 Fed. Rep. 982, 4 Am.
B. R. 402.

A failure to keep books by a husband who manages the business for his wife will not prevent a discharge being granted the wife, if she is innocent.<sup>43</sup> A failure to keep books by a partner, if it prevents the discharge of an innocent partner at all, is so only when the transactions not recorded had reference to partnership transactions so as to fall within the scope of the partners' authority.<sup>44</sup> The destruction of partnership books is ground for the refusal of a discharge to a bankrupt partner individually.<sup>46</sup>

A discharge should be denied a bankrupt, who has kept proper books of account in his business to show his financial condition at the time of the bankruptcy, and prevents their use in the settlement of his estate by destroying <sup>47</sup> or concealing <sup>48</sup> them. To conceal includes to secrete, falsify and mutilate <sup>49</sup>

The mere fact that a bankrupt fails to preserve books of account kept in his business, from which he had retired many years before bankruptcy, is not sufficient to defeat his dis-

<sup>43</sup> In re Meyers, 105 Fed. Rep. 353, 5 Am. B. R. 4; In re Hyman, 97 Fed. Rep. 195, 3 Am. B. R. 160. <sup>44</sup> In re Schultz, 109 Fed. Rep. 264, 6 Am. B. R. 91. Consult also In re Hardie & Co., 143 Fed. Rep. 607, 609, 16 Am. B. R. 313; In re Garrison (C. C. A. 2d Cir.), 149 Fed. Rep. 178, 79 C. C. A. 126, 17 Am. B. R. 831, where business conducted by partner in distant state discharge not refused. See In re Schachter, 170 Fed. Rep. 683, 22 Am. B. R. 389.

46 In re Conley, 120 Fed. Rep. 42,
 9 Am. B. R. 496.

<sup>47</sup> Ablowich v. Stursberg (C. C. A. 2d Cir.), 105 Fed. Rep. 751, 5 Am. B. R. 403, affirming 3 Am. B. R. 586; *In re* McBachron, 116 Fed. Rep. 783, 8 Am. B. R. 732. But see *In re* Studebaker (C. C. A. 2d

Cir.), 127 Fed. Rep. 951, 11 Am. B. R. 384.

48 In re McBachron, 116 Fed. Rep. 783, 8 Am. B. R. 732; In re Mendelsohn, 102 Fed. Rep. 119, 4 Am. B. R. 103; In re Jewett, 3 Fed. Rep. 503; In re Carrier, 47 Fed. Rep. 438.

49 B. A. 1898, Sec. 1, clause 22. See also In re Mendelsohn, 102 Fed. Rep. 119, 4 Am. B. R. 103, and In re Pierson, No. 11153 Fed. Cas., 10 N. B. R. 107; In re Bemis, 104 Fed. Rep. 672, 5 Am. B. R. 36; Bauman v. Feist (C. C. A. 8th Cir.), 107 Fed. Rep. 83, 5 Am. B. R. 703; In re Murray, 162 Fed. Rep. 983, 20 Am. B. R. 700, intent not proved by showing that bankrupt concealed books deemed of little account in a barrel in the cellar.

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charge,<sup>50</sup> or that he fails to keep a record of a surrender to his wife of policies belonging to her.<sup>51</sup>

A discharge should be denied a bankrupt, who has not kept books of account or records in his business.<sup>52</sup> This may result from a failure to keep proper books or from the manner in which the books are kept. The object of keeping the books is to furnish and preserve evidence of the real condition of the bankrupt's affairs, so that all of the bankrupt's proper assets and liabilities may be ascertained and his property distributed among his bona fide creditors. A bankrupt is required to have kept such books as are necessary to ascertain his financial condition. What books are necessary for this purpose depends upon the character of the business and the circumstances in each particular case.<sup>53</sup>

If the business of the bankrupt is such that ordinarily books would not be kept, he need not have kept them.<sup>54</sup> For example, the business of a mining promoter may not need elaborate accounts, and it may be sufficient for him to rely on pocket memoranda, noting the deposits and withdrawals from his bank account, having his bank book balanced each month, where he has no employees and each one of his mining deals was separate and complete in itself.<sup>55</sup>

<sup>50</sup> In re Prager & Son, 134 Fed. Rep. 1006, 13 Am. B. R. 527; In re Stark, 96 Fed. Rep. 88, 2 Am. B. R. 785.

<sup>51</sup> In re Joseph Dews, 2 Am. B. R. 483.

<sup>52</sup> Re Hanna (C. C. A. 2d Cir.),
168 Fed. Rep. 238, 93 C. C. A. 452,
21 Am. B. R. 843.

<sup>58</sup> In re Bemis, 104 Fed. Rep. 672, 5 Am. B. R. 36; In re Cashman, 103 Fed. Rep. 67, 4 Am. B. R. 326; In re Grossman, 111 Fed. Rep. 507, 6 Am. B. R. 510; In re Kenyon, 112 Fed. Rep. 658, 7 Am. B. R. 527; In re Greenberg, 114 Fed. Rep. 773, 8 Am. B. R. 94; In re Feldstein (C. C. A. 2d Cir.), 115 Fed. Rep. 259, 8 Am. B. R. 160. See also

In re Bellis, No. 1275 Fed. Cas., 4 Ben. 53; In re Gay, No. 5279 Fed. Cas., 2 N. B. R. 358; In re Smith, 16 Fed. Rep. 468; In re White, No. 17532 Fed. Cas., 2 N. B. R. 590; In re Brockway, 12 Fed. Rep. 69; In re Hammond, No. 5999 Fed. Cas., 1 Low. 381; In re Vernia, 5 Fed. Rep. 723.

54 In re Corn, 106 Fed. Rep. 143,
5 Am. B. R. 478; In re Prager & Son, 134 Fed. Rep. 1006, 13 Am.
B. R. 527; In re Keefer, 135 Fed.
Rep. 885, 14 Am. B. R. 290; Sellers v. Bell (C. C. A. 5th Cir.), 94 Fed.
Rep. 801, 2 Am. B. R. 529.

<sup>55</sup> In re Howard (C. C. A. 2d Cir.), 180 Fed. Rep. 399, 103 C. C. A. 545, 24 Am. B. R. 841.

There may be a failure to keep books, if the books are so irregularly kept that it is impossible to determine the bankrupt's financial condition from them. <sup>56</sup> Congress has not attempted to prescribe any particular system or principle of bookkeeping. The form and manner in which the books are kept is unimportant, so long as the financial condition of the bankrupt may be ascertained from them. <sup>57</sup> If a competent person upon an examination of the books and records kept by the bankrupt is able to reach a substantially correct conclusion as to the state of his affairs, it is all that is required. If he can not do this there has not been the keeping of "books of account or record," which the bankrupt act calls for.

The discharge should be refused where an important transaction is omitted from the books by which a stock of goods foreign to the ordinary business of the bankrupt is bought and then sold, although a knowledge of this purchase would have been of no benefit to the creditors, as the statute does not prescribe only such entries or omissions as are detrimental to creditors but any failure to keep books "with intent to conceal financial condition." <sup>58</sup>

The burden of proof is upon the creditor to establish the failure,<sup>59</sup> by competent evidence.<sup>60</sup> It has been held that evidence of a failure to keep any books whatever will not support an allegation complaining of the manner in which the

56 In re Feldstein (C. C. A. 2d Cir.), 115 Fed. Rep. 259, 8 Am. B. R. 160; In re Alvord, 135 Fed. Rep. 236, 14 Am. B. R. 264; In re Greenberg, 114 Fed. Rep. 773, 8 Am. B. R. 94; In re Cashman, 103 Fed. Rep. 67, 4 Am. B. R. 326; In re Morgan, 101 Fed. Rep. 982, 4 Am. B. R. 402; In re Allendorf, 129 Fed. Rep. 981, 12 Am. B. R. 320; In re Hamilton, 133 Fed. Rep. 823, 13 Am. B. R. 333.

57 In re Hamilton, 133 Fed. Rep.
 823, 13 Am. B. R. 333; In re Izdall,
 96 Fed. Rep. 314, 2 Am. B. R. 741.

<sup>58</sup> In re Schachter, 170 Fed. Rep.
 683, 22 Am. B. R. 389.

<sup>59</sup> In re Phillips, 98 Fed. 844, 3 Am. B. R. 542.

oo In re Isaac Leopold, 5 Am. B. R. 278. Presumption here that bankrupt concealed his books of account, where he testifies that the same were in his safe when he was taken ill, and it appears that no one had access thereto until the time when the books were found missing. In re Lewin, 155 Fed. 501, 18 Am. B. R. 72.

books were kept so as to prevent a discharge.<sup>62</sup> In such a case the court on application will ordinarily allow the pleadings to be amended to conform to the evidence.

### § 729. Intent to conceal financial condition.

In order to defeat a discharge there must be an intent on the part of the bankrupt to conceal his financial condition, where he has destroyed, concealed or failed to keep books.<sup>63</sup>

In bankruptcy proceedings begun prior to the amendment of 1903, the intent must be fraudulent.<sup>66</sup> It is not necessary to allege or prove, in proceedings begun since the amendment of February 5, 1903, that the intent was fraudulent or that the destruction, concealment or failure to keep books was in contemplation of bankruptcy in order to defeat a discharge.<sup>67</sup> It is necessary to allege and prove these things when the bankruptcy proceeding was begun before that time.<sup>68</sup> An intent to conceal his financial condition is all

<sup>62</sup> In re Halsell, 132 Fed. Rep. 562, 13 Am. B. R. 106.

63 B. A. 1898, Sec. 14b, as amended February 5, 1903, 32 Stat. at L. 797. In re Allendorf, 129 Fed. Rep. 981, 12 Am. B. R. 320; Godshalk v. Sterling (C. C. A. 2d Cir.), 129 Fed. Rep. 580, 12 Am. B. R. 302; In re Keefer, 135 Fed. Rep. 885, 14 Am. B. R. 290; In re Hamilton, 133 Fed, Rep. 823, 13 Am. B. R. 333; In re Goldich, 164 Fed. 882, 21 Am. B. R. 249; In re Burstein, 160 Fed. 765, 20 Am. B. R. 399. No fraudulent intent is indicated by the failure of a mine superintendent to keep books of account. In re Mc-Crea (C. C. A. 2d Cir.), 161 Fed. Rep. 246, 88 C. C. A. 282, 20 Am. B. R. 412. Where a bankrupt admits he destroyed his books of account with intent to conceal the records of his business, which, if exhibited, might subject him to a

criminal prosecution, he will be refused a discharge. *In re* Wolf, 156 Fed. 543, 19 Am. B. R. 70.

<sup>66</sup> B. A. 1898, Sec. 14b; In re Studebaker (C. C. A. 2d Cir.), 127
Fed. Rep. 951, 11 Am. B. R. 384;
Van Ingen v. 'Schophofen (C. C. A. 8th Cir.), 129
Fed. Rep. 352, 12 Am. B. R. 24; In re Feldstein (C. C. A. 2d Cir.), 115
Fed. Rep. 259, & Am. B. R. 160; In re Izdall, 96
Fed. Rep. 314, 2 Am. B. R. 741.
<sup>67</sup> In re Alvord, 135
Fed. Rep. 236, 14 Am. B. R. 264.

<sup>68</sup> Van Ingen v. Schophofen (C. C. A. 8th Cir.), 129 Fed. Rep. 352, 12 Am. B. R. 24; In re Mackenzie, 132 Fed. Rep. 114, 12 Am. B. R. 605; In re Studebaker (C. C. A. 2d Cir.), 127 Fed. Rep. 951, 11 Am. B. R. 384; In re Feldstein (C. C. A. 2d Cir.), 115 Fed. Rep. 259, 8
Am. B. R. 160.

that the creditors opposing the discharge of a bankrupt are required to establish in proceedings begun since the amendment of 1903.69

Where the bankrupt acts honestly without intent to cover up his financial condition, he is entitled to a discharge, although he may have destroyed or neglected to keep books through inadvertence, ignorance or mistake. Under the act of 1867 a simple failure of merchants and tradesmen to keep books of account, irrespective of intent, was all that was necessary to defeat a discharge.<sup>71</sup>

The intent of the bankrupt can not ordinarily be proved by direct evidence. The bankrupt is presumed to intend the direct natural consequences of his acts. If the result is to produce inexplicable confusion of the bankrupt's financial affairs, the bankrupt must be held to have intended to conceal his financial condition.<sup>72</sup>

The burden of proof is upon the opposing creditors to establish by clear and convincing evidence that the bankrupt has destroyed, concealed or failed to keep books of record or account with the intent to conceal his financial condition.<sup>74</sup>

69 In re Alvord, 135 Fed. Rep. 236, 14 Am. B. R. 264; Godshalk v. Sterling (C. C. A. 3d Cir.), 129 Fed. Rep. 580, 12 Am. B. R. 302. An objection to the discharge for failure to keep books is defective where it omits a statement of intent to conceal financial condition, but may be amended. In re Bradin, 179 Fed. Rep. 768, 24 Am. B. R. 793.

<sup>71</sup> R. S. Sec 5110, clause 7; *In re* Hunt, 26 Fed. Rep. 739.

<sup>72</sup> In re Alvord, 135 Fed. Rep. 236, 14 Am. B. R. 264. A failure of a bankrupt to enter on his books, loans from relatives and friends was found to be with intention to conceal his financial contention.

dition and was a bar to his discharge notwithstanding the bankrupt's explanation that he did not set down the notes as he thought these creditors would not push him. *In re* Koelle, 171 Fed. Rep. 257, 22 Am. B. R. 515.

74 In re Hamilton, 133 Fed. Rep. 823, 13 Am. B. R. 333; In re Keefer, 135 Fed. Rep. 885, 14 Am. B. R. 290; In re Chamberlain, 125 Fed. Rep. 629, 11 Am. B. R. 95; In re Eades (C. C. A. 7th Cir.), 143 Fed. Rep. 292, 16 Am. B. R. 30; In re Brockman, 168 Fed. 1015, 21 Am. B. R. 251. No presumption from failure to keep books. Must show intent.

# § 730. Obtain property on credit upon a false statement.

A bankrupt will not be granted a discharge in proceedings begun since February 5, 1903, when he has obtained property on credit from any person, upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit.<sup>75</sup>

This bar to a discharge was added by the amendment of February 5, 1903. Nothing like it is contained in any prior bankruptcy laws of this country. It applies only to proceedings begun since the date of the amendment.

To prevent a discharge under this provision, two things must be established by the objecting creditor: first, the bankrupt must have obtained property on credit, and, second, he must have made to the person from whom he obtained it a materially false statement in writing for the purpose of obtaining it on credit.

The statement referred to in this provision must be made by the bankrupt, or his agent with his authority, <sup>76</sup> to the creditor giving him credit. It need not be made to the creditor opposing the discharge, <sup>77</sup> but may have been made to a commercial agency. <sup>78</sup> It has been held sufficient to bar his discharge if the false statement was made to a creditor whose debt was paid in full before bankruptcy. <sup>79</sup> A false statement made by one partner upon which credit was extended to the firm has been held sufficient to defeat the discharge of another partner. <sup>80</sup> But a false statement in writing

<sup>75</sup> B. A. 1898, Sec. 14b, as amended Feb. 5, 1903, 32 Stat, at L. 797; and June 25, 1910; In re Scott, 126 Fed. Rep. 981, 11 Am. B. R. 327; In re Griffin, 180 Fed. Rep. 792, 25 Am. B. R. 206; In re Dareveski, 171 Fed. Rep. 288, 22 Am. B. R. 571.

<sup>76</sup> In re Goodhile, 130 Fed. Rep. 782, 12 Am. B. R. 380. Cf. Statute, June 25, 1910, Sec. 6.

<sup>77</sup> In re Harr, 143 Fed. Rep. 421, 16 Am. B. R. 213.

78 In re Augspurger, 181 Fed.
Rep. 174, 25 Am. B. R. 83. Cf.
Katzenstein v. Reid, 41 Tex. Civ.
App. 106, 16 Am. B. R. 740; In re
Caston, 148 Fed. Rep. 63; In re
Kyte, 174 Fed. Rep. 867, 23 Am. B.
R. 414.

<sup>79</sup> In re Harr, 143 Fed. Rep. 421, 16 Am. B. R. 213.

<sup>80</sup> In re Hardie & Co., 143 Fed. Rep. 607, 16 Am. B. R. 313. by one partner will not bar a personal discharge of another partner.<sup>81</sup>

A false statement made by a bankrupt may bar his right to a discharge although the credit was obtained by a corporation of which the bankrupt owned the majority of the stock, 82 or by a partnership of which he was a member, 82\* or although the goods were not obtained for the bankrupt, but were obtained on his credit merely as principal or surety. 83

An oral statement is not sufficient. It must be in writing, but there is nothing in the act which requires it to be signed by the debtor.<sup>84</sup>

The statement must be materially false in fact. It must be willfully and intentionally misleading. A statement made for the purpose of obtaining credit is knowingly and intentionally false where it omits notes held by the bankrupt's father, although it was understood between them that any loss on these notes should be taken out of the bankrupt's inheritance from the father's estate. The omission of notes held by the bankrupt's wife can not be properly explained by the statement that he regarded that as capital for use in the business. In this case the bankrupt included both debts in his schedules, and his discharge was refused. 86

If the statement is made for the purpose of obtaining property on credit, is false and was relied upon by the creditor upon the faith of which he made the sale on credit, it is sufficient to defeat a discharge.<sup>87</sup> If the creditor does not give credit on the faith of the statement,<sup>88</sup> or if the

81 Frank v. Michigan Paper Co.
(C. C. A. 4th Cir.), 179 Fed. 776,
103 C. C. A. 268, 24 Am. B. R. 261.
82 In re Dresser & Co., 144 Fed.

Rep. 318, 13 Am. B. R. 616. 82\* In re Terens, 172 Fed. Rep.

938, 23 Am. B. R. 680.

83 Re Aldridge, 168 Fed. 93.84 It may have been signed by an-

other in good faith. Re Aldridge, 168 Fed. Rep. 93.

85 Gilpin v. Nat. Bank (C. C. A.
 3d Cir.), 165 Fed. Rep. 607, 91 C.

C. A. 445, 21 Am. B. R. 429; In re Kyte, 174 Fed. Rep. 867, 23 Am. B. R. 414; Firestone v. Harvey (C. C. A. 6th Cir.), 174 Fed. Rep. 575, 98 C. C. A. 420, 23 Am. B. R. 468.

But see In re Petersen, 10 Am. B. R. 355.

86 In re Augspurger, 181 Fed.Rep. 174, 25 Am. B. R. 83.

87 In re Goodhile, 130 Fed. Rep.
782, 12 Am. B. R. 380.

88 In re Kaplan, 141 Fed. Rep.

debtor did not make the statement for the purpose of obtaining the property on credit,<sup>89</sup> it will not bar a discharge, no matter how false the statement may be.

There is no time limit fixed by the statute within which the statement must be made.<sup>90</sup> It may be made more than four months prior to filing the petition and defeat a discharge.<sup>91</sup>

This ground may be pleaded by the creditor selling the goods or any other person entitled to oppose the discharge.<sup>92</sup>

In pleading this objection the specifications should set out the false representations and give the names of persons alleged to have been defrauded.<sup>93</sup> The burden of proof, as in other objections to a discharge, is upon the objecting creditors.<sup>94</sup>

The amendment of 1910 amplified this section by inserting the words "money or" before "property," and by providing that the statement must be made by the bankrupt to the creditor "or his representative for the purpose of obtaining credit from such person." 94\*

Sections 17 and 14 do not limit each other, "because on looking to the particular subjects treated of by them respectively, they are found to be not in pari materia. Releasing an insolvent debtor from his debts is an act of grace. The fixing by Congress of the considerations on which the discharge will be granted or withheld is a matter separate and apart from determining the effect to be given the discharge in subsequent litigation." <sup>95</sup>

463, 15 Am. B. R. 534; *In re* Allendorf, 129 Fed. Rep. 981, 12 Am. B. R. 320.

89 In re Allendorf, 129 Fed. Rep.981, 12 Am. B. R. 320.

90 In re Scott, 126 Fed. Rep. 981,
11 Am. B. R. 327; In re Petersen,
10 Am. B. R. 355; In re Dresser & Co., 144 Fed. Rep. 318, 13 Am. B. R. 616.

91 In re Scott, 126 Fed. Rep. 981,11 Am. B. R. 327.

<sup>92</sup> In re Harr, 143 Fed. Rep. 421, 16 Am. B. R. 213.

98 Godshalk v. Sterling (C. C. A.
3d Cir.), 129 Fed. Rep. 580, 12 Am.
B. R. 302; *In re* Levey, 133, Fed.
Rep. 572, 13 Am. B. R. 312.

<sup>94</sup> In re Hamilton, 133 Fed. Rep. 823, 13 Am. B. R. 333.

94\* Section 6 of the act of June 25, 1910, 36 Stat. at L. 838.

95 Talcott v. Friend (C. C. A. 7th. Cir.), 179 Fed: Rep. 676, 103 C. C. A. 80, 24 Am. B. R. 708.

### § 731. Fraudulent transfer.

A bankrupt will not be granted a discharge in proceedings begun since February 5, 1903, when he has, at any time subsequent to the first day of the four months immediately preceding the filing of the petition, transferred, removed, destroyed or concealed, or permitted to be removed, destroyed, or concealed, any of his property with intent to hinder, delay or defraud his creditors.<sup>96</sup>

This bar to a discharge was added by the amendment of February 5, 1903, and applies only to proceedings instituted since that date.

This is substantially the phraseology used in the first act of bankruptcy. If the objecting creditor can show the commission of an act by the bankrupt after the first day of the four months' period, which would be an act of bankruptcy under Section 3a, clause 1, if committed prior to the filing of the petition, the bankrupt is not entitled to a discharge. This provision makes conveyances which by the common law and the statute of Elizabeth were held void, because fraudulent, a ground for refusing a discharge to a bankrupt. A mere constructive fraud is not sufficient to defeat a discharge. The test is the presence or absence of real fraud. 98

96 B. A. 1898, Sec. 14b, as amended Feb, 5, 1903, 32 Stat. at L. 797 and the act of June 25, 1911, 36 Stat. at L. 838; In re Miller, 135 Fed. Rep. 591, 14 Am. B. R. 329; In re Schenck, 116 Fed. Rep. 554, 8 Am. B. R. 727; In re Young, 140 Fed. Rep. 728, 15 Am. B. R. 477; In re Jacobs & Verstandig, 147 Fed. Rep. 797.

As to fraudulent concealment of assets involved in fraudulent transfer, see Sec. 381.

<sup>97</sup> As to what constitutes such act of bankruptcy, see Secs. 143 and 144, ante.

<sup>98</sup> In re Brumbaugh, 128 Fed. Rep. 971, 12 Am. B. R. 204; In re Miller, 135 Fed. Rep. 591, 14 Am. B. R.

329; In re Gift, 130 Fed. Rep. 230, 12 Am. B. R. 244; In re Brown, 140 Fed. Rep. 383, 15 Am. B. R. 350; In re Dauchy (C. C. A. 2d Cir.), 122 Fed. Rep. 691, 11 Am. B. R. 527; In re LeClaire, 124 Fed. Rep. 655, 10 Am. B. R. 733. See also Lansing Boiler & Engine Works v. Ryerson (C. C. A. 6th Cir.), 128 Fed. Rep. 701, 11 Am. B. R. 558; In re Battle, 154 Fed. 741, 19 Am. B. R. 40. See In re Hedley, 156 Fed. 314, 19 Am. B. R. 409 (assignment to wife to reimburse her for debt not fraudulent).

Where a bankrupt openly transfers real estate to his wife in 1894, the fact that he continues to live Where a creditor has an option either to sue for a conversion or to rescind a contract and he waives the fraud and elects to sue for a conversion, he has affirmed the sale and can not object to a discharge on the ground of fraud. 100

A conveyance prior to 1898, though fraudulent, could not prevent the discharge, as the question of fraud in conveyances made prior to the bankruptcy act could not be determined in a hearing on the discharge.<sup>1</sup> An assignment for the benefit of creditors is not in itself fraudulent,<sup>2</sup> and will not bar a discharge. A preference is not made a bar to a discharge.<sup>3</sup>

The property transferred or concealed must belong to the bankrupt to fall within this provision.<sup>4</sup> The words "with intent to hinder, delay and defraud creditors" mean for the purpose of defrauding the entire body of creditors and not the conversion of the property of one creditor. The fact that a stock broker transfers stock pledged with him will not bar his discharge.<sup>5</sup> Where the fraudulent transaction took place more than four months prior to filing the petition in bankruptcy, it will not prevent a discharge,<sup>6</sup> but when it is made before the four months' period and recorded within that period it may be set up as a ground of objection.<sup>7</sup> Where a discharge is objected to on this ground the specifi-

Where a discharge is objected to on this ground the specification should describe the property claimed to be fraudulently transferred or concealed, giving the name of the

on it with her and did work worth not more than his board does not show a fraudulent transfer or that he retained any interest in the property. *In re* Wermuth, 179 Fed. 1009, 24 Am. B. R. 785.

<sup>100</sup> In re Ennis & Stoppani, 171
Fed. Rep. 755, 22 Am. B. R. 679.

<sup>1</sup> Shreck v. Hanlon, 74 Neb. 264, 104 N. W. 193.

Randolph v. Scruggs, 190 U. S.
 533, 47 L. Ed. 1165, 10 Am. B. R. 1.
 In re Maher, 144 Fed. Rep. 505,
 Am. B. R. 340.

<sup>4</sup> In re Berry & Co., 146 Fed. Rep. 623, 15 Am. B. R. 360; Vehon v. Ullman (C. C. A. 7th Cir.), 147 Fed. Rep. 694, 78 C. C. A. 82, 17 Am. B. R. 435.

<sup>5</sup> In re Berry & Co., 146 Fed. Rep. 623, 15 Am. B. R. 360.

<sup>6</sup> In re Brumbaugh, 128 Fed. Rep. 971, 12 Am. B. R. 204.

<sup>7</sup> In re McKane, 155 Fed. 674; 19 Am. B. R. 103. Compare amendatory act of June 25, 1910, Sec. 8, discussed under Secs. 441 to 443, supra.

person holding the title, the time of the transfer and any other fact necessary to identify the transaction.<sup>8</sup> The allegation may be amended for the purpose of amplifying the original averment where the substance is not changed by the amendment.<sup>9</sup>

The burden of establishing this ground of opposition by clear and convincing proof is on the objecting creditor.

## § 732. A discharge within six years.

A bankrupt will not be granted a discharge in proceedings begun since February 5, 1903, when, in voluntary proceedings he has been granted a discharge in bankruptcy within six years.<sup>10</sup>

This bar to a discharge was added by the amendment of February 5, 1903, and applies only to proceedings instituted since that date. It is not retroactive as applied to cases where the first proceedings were had prior to the amendment. It merely adds a new condition of discharge in cases instituted after the amendment.<sup>11</sup>

The bar is limited to discharges actually granted in voluntary proceedings. A discharge granted in a partnership proceeding instituted by one partner is one granted in voluntary proceedings. When a discharge has been granted in a voluntary proceeding, it operates as a bar to a discharge being granted within the prescribed period in a subsequent proceeding, either voluntary or involuntary. 14

8 In re Parish, 122 Fed. Rep. 553,
 10 Am. B. R. 548; In re Gift, 130
 Fed. Rep. 230, 12 Am. B. R. 244.

In re Gift, 130 Fed. Rep. 230,12 Am. B. R. 244.

<sup>10</sup> B. A. 1898, Sec. 14b, as amended Feb. 5, 1903, 32 Stat. at L. 797, and June 25, 1910. *In re* Haase, 155 Fed. 553, 17 Am. B. R. 528.

<sup>11</sup> In re Carleton, 131 Fed. Rep. 146, 12 Am. B. R. 475: In re Seaholm (C. C. A. 1st Cir.), 136 Fed.

Rep. 144, 69 C. C. A. 142, 14 Am. B. R. 292.

<sup>12</sup> In re Seaholm (C. C. A. 1st Cir.), 136 Fed. Rep. 144, 69 C. C. A. 142, 14 Am. B. R. 292; In re Neely, 134 Fed. Rep. 667, 12 Am. B. R. 407.

<sup>18</sup> In re Carleton, 131 Fed. Rep.146, 12 Am. B. R. 475.

14 In re Neely, 134 Fed. Rep. 667,
12 Am. B. R. 407; In re Carleton,
131 Fed. Rep. 146, 12 Am. B. R.
475.

The six years' limit runs from the date of the discharge in voluntary proceedings to the date of judicial action upon an application for the next discharge either in voluntary or involuntary proceedings.<sup>15</sup>

Where within five years of his discharge a voluntary bankrupt is again adjudicated a bankrupt on his own petition, his motion for leave to withdraw the proceedings, because he could not obtain a discharge, will be denied where his creditors object.<sup>16</sup>

## § 733. Refusal to obey order or to answer questions.

A bankrupt will not be granted a discharge in proceedings begun since February 5, 1903, when, in the course of the proceedings in bankruptcy, he has refused to obey any lawful order of or to answer any material question approved by the court.<sup>17</sup>

To prevent a discharge it must appear that the order was lawful and made in the course of bankruptcy proceedings. If the bankrupt is guilty (not necessarily convicted) of contempt in refusing to obey an order of court made in bankruptcy proceedings, he is not entitled to a discharge. It is not necessary that a bankrupt actually declare that he will not obey the order. A delay or failure to perform on his part for a reasonable time, after an order is made, is a sufficient refusal to prevent a discharge.

To prevent a discharge for refusing to answer a question, it should be observed that the question must be material and approved by the judge or referee. If the bankrupt refuses to answer such a question, he is not entitled to his discharge. 18 It does not deprive him of his constitutional right of im-

<sup>15</sup> In re Little (C. C. A. 7th Cir.),
137 Fed. Rep. 521, 13 Am. B. R.
640; In re Jordan, 142 Fed. Rep.
292, 15 Am. B. R. 449.

<sup>16</sup> In re Smith, 155 Fed. 688, 19 Am. B. R. 63.

<sup>17</sup> B. A. 1898, Sec. 14b, as amend-

ed Feb. 5, 1903, 32 Stat. at L. 797, and June 25, 1910.

<sup>18</sup> In re Dresser (C. C. A. 2d
 Cir.), 146 Fed. Rep. 383, 16 Am.
 B. R. 561, affirming 144 Fed. Rep. 318, 13 Am. B. R. 616.

munity from self-incrimination. The proceeding for a discharge is not a criminal proceeding, and the constitutional protection extends to the protection of the witness in criminal proceedings only, and it may always be waived by the witness himself.<sup>19</sup>

## § 734. The hearing of an application for discharge.

The statute provides that "the judge shall hear the application for a discharge and such proofs and pleas as may be made in opposition thereto by the trustee or other parties in interest, at such time as will give the trustee or parties in interest a reasonable opportunity to be heard, and investigate the merits of the application.<sup>21</sup>

It is the duty of the bankrupt to set his application for a discharge for hearing. But laches in so doing may not be a ground for dismissal.<sup>22</sup>

If the bankrupt is dilatory in bringing the matter on for hearing, an opposing creditor may set the application for discharge and specification of objections for hearing.<sup>25</sup>

When an appearance has been entered by any creditor against the discharge the proceedings upon the petition are no longer under the exclusive control of the bankrupt, but the opposing

<sup>19</sup> Burrell v. Montana, 194 U. S. 572, 48 L. Ed. 1122, 12 Am. B. R. 132. As to privilege and immunity see further Sec. 627, ante.

A bankrupt who refuses to answer a question relating to an alleged payment to a creditor of a large sum of money just before bankruptcy, upon the ground that his answer would tend to degrade and incriminate him, will be denied a discharge, although he afterwards signifies his willingness to answer. *In re* Weinreb (C. C. A. 2d Cir.), 153 Fed. Rep. 363, 82 C. C. A. 439, 18 Am. B. R. 387.

<sup>21</sup> B. A. 1898, Sec. 14b, as amended June 25, 1910.

<sup>22</sup> In re Wolff, 132 Fed. Rep. 396, 13 Am. B. R. 95. See *In re* Lederer, 125 Fed. Rep. 96, 10 Am. B. R. 492, where application dismissed for want of prosecution for a year.

In the eastern district of New York it is the duty of creditors opposing a bankrupt's application for his discharge to arrange for the hearing before the referee as special master. *In re* Eldred, 152 Fed. Rep. 491, 18 Am. B. R. 243. And if the creditor does not do so the objection may be dismissed. *In re* Fritz, 173 Fed. Rep. 560, 23 Am. B. R. 84.

25 In re Sutherland, No. 13640
 Fed. Cas., Deady, 573.

creditor can not move to dismiss the petition or that its prayer be denied because the bankrupt is, or supposed to be, dilatory in bringing the matter on for hearing. The proper course for the creditor is to move the court to set down the matter for hearing upon the petition and his objections thereto, if any be filed.<sup>26</sup>

A hearing on a petition for discharge may be continued for the purpose of examining the bankrupt.<sup>27</sup> The bankrupt may be required to attend the hearing, if creditors request it.<sup>28</sup> If he fails to do so, his application for a discharge may be dismissed.<sup>29</sup>

The application for a discharge must be heard and decided by the judge.<sup>30</sup> He may try the issues himself or may refer such an application to the referee to ascertain and report the facts.<sup>31</sup> The referee can not finally determine the question of discharge or non-discharge,<sup>33</sup> but he may be ordered to report the facts and his recommendation or conclusion as to the matter. He aids the court like a master in chancery.

By the act of 1867 authority was given the court "in its discretion" to order any question of fact presented by the specification in opposition to a discharge to be tried by jury.<sup>34</sup>

<sup>26</sup> In re Sutherland, No. 13640 Fed. Cas., Deady, 573.

<sup>27</sup> In re Seckendorf, No. 12600 Fed. Cas., 2 Ben. 462; In re Thompson, No. 13935 Fed. Cas., 2 Ben. 166; In re Jacobs, No. 7160 Fed. Cas., 5 Saw. 458.

<sup>28</sup> B. A. 1898, Sec. 7, clause 1; In re Shanker, 138 Fed. Rep. 862, 15 Am. B. R. 109.

<sup>29</sup> In re Shanker, 138 Fed. Rep. 862, 15 Am. B. R. 109.

<sup>30</sup> B. A. 1898, Sec. 14b; Gen. Ord.
12, clause 3. Watson v. McDuff (C. C. A. 5th Cir.), 101 Fed. Rep. 241.
41 C. C. A. 316, 4 Am. B. R. 110.

81 General Ord. 12, clause 3. Watson v. McDuff (C. C. A. 5th Cir.),
101 Fed. Rep. 241, 4 Am. B. R. 110;

In re Rauchenplat, 1 P. R. 471, 9 Am. B. R. 763; In re Kaiser, 99 Fed. Rep. 689, 3 Am. B. R. 767; Watson v. McDuff (C. C. A. 5th Cir.), 101 Fed. Rep. 241, 4 Am. B. R. 110; In re Johnson, 158 Fed. Rep. 342, 19 Am. B. R. 814.

It was held not error to reserve decision as to admissibility of testimony under insufficient specifications where objections were passed on before close of the case and exceptions reserved. *In re* Knaszak, 151 Fed. 503, 18 Am. B. R. 187.

<sup>33</sup> B. A. 1898, Sec. 38*a*, clause 4; Gen. Ord. 12, clause 3.

<sup>34</sup> R. S. Sec. 5111; Morgan v. Thornhill, 11 Wall. 65, 77, 20 L. Ed. 60; *In re* Holst, 11 Fed. Rep. 856.

The court may in its discretion under the present act direct an issue to be tried by the jury.<sup>35</sup> This course is seldom if ever resorted to.

Where an application for a discharge is contested it is common practice for the judge to refer the matter to the referee for a report. The clerk thereupon sends the referee all papers connected with the application. The referee sets a time and place for the hearing or trial, which is had before him. It is the duty of the referee to determine the sufficiency of the specification so far as to decide whether to permit testimony. If the specification is insufficient, he should report back to the court that nothing has been filed with him in the way of objections requiring the taking of testimony.<sup>36</sup>

#### § 735. Evidence.

Testimony taken upon examination of the bankrupt is taken in the whole proceeding and may be introduced and read upon the hearing of a petition for a discharge,<sup>37</sup> but where the examination is not introduced before the master he has no right to consider it though he took it himself while sitting as referee.<sup>38</sup> Testimony of persons other than the bankrupt taken outside the hearing is not admissible upon such hearing.<sup>39</sup>

<sup>85</sup> B. A. 1898, Sec. 19b and 19c.
See Barton v. Barbour, 104 U. S. 126, 26 L. Ed. 672.

<sup>36</sup> In re Hendrick, 138 Fed. Rep. 473, 14 Am. B. R. 795; In re Kaiser, 99 Fed. Rep. 689, 3 Am. B. R. 767.

<sup>37</sup> In re Gaylord (C. C. A. 2d Cir.), 112 Fed. Rep. 668, 7 Am. B. R. 1; In re Wilcox (C. C. A. 2d Cir.), 109 Fed. Rep. 628, 6 Am. B. R. 362; In re Goodhile, 130 Fed. Rep. 782, 12 Am. B. R. 380; In re Wiesen Bros., 135 Fed. Rep. 442, 14

Am. B. R. 347; In re Alphin & Lake Cotton Co., 131 Fed. Rep. 824, 12 Am. B. R. 653. See Sec. 629, ante. <sup>88</sup> In re Murray, 162 Fed. 983, 20 Am. B. R. 700.

<sup>89</sup> In re Wilcox (C. C. A. 2d Cir.), 109 Fed. Rep. 628, 6 Am. B. R. 362; In re Weisen Bros., 135 Fed. Rep. 442, 14 Am. B. R. 347; In re Alphin & Lake Cotton Co., 131 Fed. Rep. 824, 12 Am. B. R. 653; In re Goodhile, 130 Fed. Rep. 782, 12 Am. B. R. 380. See Sec. 629, ante.

The proof in support of the specification should be confined to proving the allegations contained in it. The opposing party is bound by them and can not go beyond them and produce evidence outside of them.<sup>40</sup> He is not required to prove all the grounds alleged. If any one ground is sustained by the evidence it is sufficient to defeat the discharge.<sup>41</sup>

The court will not reopen a case for the purpose of introducing additional evidence in opposition to a discharge where the creditor has had ample opportunity to present his case.<sup>42</sup>

# § 736. Burden of proof.42\*

The burden of proof is on the objecting creditor to establish by clear and convincing evidence his ground of objection.<sup>43</sup> It is not necessary for the objecting party to prove his case beyond a reasonable doubt; a fair preponderance of evidence is sufficient.<sup>44</sup>

## § 737. Record of proceedings before referee.

If the specification is sufficient, proofs may be taken before the referee in support of and against the grounds of opposition to the discharge. The testimony may be taken down in narrative form or by question and answer.<sup>45</sup> When objections are

40 In re Taplin, 135 Fed. Rep. 861,
14 Am. B. R. 360; In re Halsell,
132 Fed. Rep. 562, 13 Am. B. R.
106; In re Kaiser, 99 Fed. Rep.
689, 3 Am. B. R. 767.

<sup>41</sup> Hudson v. Mercantile National Bank (C. C. A. 8th Cir.), 119 Fed. Rep. 346, 9 Am. B. R. 432.

<sup>42</sup> Kentucky Nat. Bank v. Carley (C. C. A. 3d Cir.), 121 Fed. Rep. 822, 10 Am. B. R. 375.

<sup>42\*</sup> As to burden of proving various grounds for opposing discharge, see those titles.

<sup>48</sup> In re Gaylord (C. C. A. 2d Cir.), 112 Fed. Rep. 668, 7 Am. B.

R. 1; In re Eades (C. C. A. 7th Cir.), 143 Fed. Rep. 293, 16 Am. B. R. 30; In re Chamberlain, 125 Fed. Rep. 629, 11 Am. B. R. 95; In re Hamilton, 133 Fed. Rep. 823, 13 Am. B. R. 333; In re Keefer, 135 Fed. Rep. 885, 14 Am. B. R. 290; In re Howdon, 111 Fed. Rep. 723, 7 Am. B. R. 191; In re Brockman, 168 Fed. Rep. 1015, 21 Am. B. R. 251.

44 In re Gaylord (C. C. A. 2d Cir.), 112 Fed. Rep. 668, 7 Am. B. R. 1; In re Dauchy, 122 Fed. Rep. 688, 10 Am. B. R. 527.

45 General Ord. 22.

made to questions and answers, the grounds of the objections and the rulings of the referee should be noted by the referee. He should also include evidence offered, although he may decide it to be incompetent, immaterial or irrelevant. 46

He should receive all the evidence offered and make a record of all that transpires on the examination of the witness. Questions, objections, rulings, exceptions and answers should all be taken down for the use of the court. The judge who is to decide the question of discharge is entitled to have all of the evidence for that purpose and to determine what evidence shall be excluded and what may be included.

### § 738. Referee's report.

At the conclusion of the testimony the referee will hear arguments of counsel and report to the judge his findings of fact and conclusions of law together with a recommendation as to whether the bankrupt is entitled to a discharge or not <sup>47</sup> on each one of the grounds of objection set up. <sup>48</sup> To this report the bankrupt or the persons opposing his discharge may file exceptions. The referee should fix a date within which to file them. The exceptions should be presented to the referee within such time as to permit him to correct his report if he is in error. <sup>49</sup>

The referee's report should not be filed till the trustee's examination of the bankrupt is formally closed.<sup>50</sup> The report together with his record of evidence and all papers and pleadings connected with the application are then sent to the clerk.

The report is considered by the judge, either upon a motion to confirm or upon the exceptions. A day is fixed for hearing before the judge. Counsel may be heard on

<sup>46</sup> In re Lipset, 119 Fed. Rep. 379, 9 Am. B. R. 32; In re Romine, 138 Fed. Rep. 837, 14 Am. B. R. 785. As to the manner of proceeding before a referee generally, see Sec. 91, et seq., ante.

<sup>47</sup> In re Steed & Curtis, 107 Fed. Rep. 682, 6 Am. B. R. 73; In re Johnson, 158 Fed. Rep. 342, 19 Am. B. R. 814. See *In re* Walder, 152Fed. Rep. 489, 18 Am. B. R. 419.

<sup>48</sup> In re Haskell, 164 Fed. Rep. 301, 20 Am. B. R. 914.

<sup>49</sup> As was done *In re* Kahn, 130 Fed. Rep. 1023, 12 Am. B. R. 793.

50 In re Johnson, 158 Fed. Rep.342, 19 Am. B. R. 814.

behalf of the objecting creditors and the bankrupt. The judge reviews both law and fact. He will ordinarily give the same weight to the findings of fact by the referee as are given to reports of masters in chancery.<sup>51</sup> The judge may permit additional testimony to be introduced before him or he may refer the matter again to the referee for further investigation.<sup>58</sup>

### § 739. Referee's compensation—Costs.58\*

A referee is not entitled to extra compensation for services on a reference of, a specification of objections to the discharge of a bankrupt.<sup>54</sup>

Such compensation has been allowed in a few cases on the ground that the service performed was that of a special master and was not included among the duties required of a referee. It should be observed that General Order 12 expressly provides for such reference to "the referee" and not to a special master. Section 72 added by the amendment of 1903 6 clearly prohibits such compensation.

51 See Sec. 95, ante; In re Covington, 110 Fed. Rep. 143, 6 Am. B. R. 373; In re Lafleche, 109 Fed. Rep. 307, 6 Am. B. R. 483; In re Stout, 109 Fed. Rep. 794, 6 Am. B. R. 505; In re Forth, 151 Fed. Rep. 951, 18 Am. B. R. 186; In re Wheeler (C. C. A. 7th Cir.), 165 Fed. Rep. 188, 21 Am. B. R. 262. Where the findings of a referee recommending a discharge are supported by testimony, an order refusing a discharge will be reversed. Boyd v. Arnold, Loucheim & Co. (C. C. A. 5th Cir.), 149 Fed. Rep. 187, 79 C. C. A. 135, 17 Am. B. R. 839.

As to the weight to be given a report of a referee generally, see observation of Judge Lowell in *In re* 

Swift, 118 Fed. Rep. 348, 9 Am. B. R. 237.

<sup>53</sup> In re Sanborn, 131 Fed. Rep.
397, 12 Am. B. R. 428; In re Steed
& Curtis, 107 Fed. Rep. 682, 6 Am.
B. R. 73.

58\* As to compensation of referee, see Sec. 98, ante.

<sup>54</sup> Bragassa v. St. Louis Cycle
(C. C. A. 5th Cir.), 107 Fed. Rep.
77, 5 Am. B. R. 700. B. A. 1898,
Sec. 72, added by amendment of
Feb. 5, 1903, 32 Stat. at L. 797.

55 Fellows v. Freudenthal, 102 Fed.
Rep. 731, 4 Am. B. R. 490; In re Grossman, 111 Fed. Rep. 507, 6 Am.
B. R. 510.

<sup>56</sup> 32 Stat. at L. 797, as amended June 25, 1910, 36 Stat. at L. 838.

## § 740. Order granting discharge.

The order must be regularly entered only after the specifications of objections have been disposed of.<sup>57</sup> The discharge should not be granted until the specifications of objection have been disposed of. Referee's certificate of conformity is unauthorized where petition for a discharge not properly referred to him.

It is within the power of Congress to grant or to refuse a discharge to a bankrupt upon such conditions as it may deem proper. Such a privilege is not a natural right, or a right of property, but is a matter of favor, to be accepted upon such terms as Congress sees fit to impose, and is in no way dependent on the settlement of the estate.<sup>59</sup>

It is the duty of the court to discharge the applicant unless he has committed one of the acts specifically set out as a reason for refusing the discharge.<sup>60</sup>

These are the only grounds on which the court can refuse a discharge, except that the judge may refuse it when the court is without jurisdiction of the proceedings. The fact that the discharge may not have the effect to release debts is no ground for refusing it. The issue upon the effect of a

<sup>57</sup> Where no order was ever entered upon the memorandum of a district judge refusing a discharge, the question is not *res judicata*, and when the order is later entered, the bankrupts may appeal from it. *In re* Elkind (C. C. A. 2d Cir.), 175 Fed. Rep. 64, 99 C. C. A. 86, 23 Am. B. R. 166.

In re Randall, 159 Fed. 298, 20 Am. B. R. 305. (The discharge should not be granted until the specifications of objection have been disposed of. Referee's certificate of conformity is unauthorized where petition for a discharge not properly referred to him.)

<sup>59</sup> Bunch v. Smith, 116 Tenn. 201, 93 S. W. 80.

60 B. A. 1898, Sec. 14b, and amendment of Feb. 5, 1903, 32 Stat. at L. 797; and June 25, 1910; Official Form No. 59; see Form No. 164, post; Smith v. Keegan (C. C. A. 1st Cir.), 111 Fed. Rep. 157, 7 Am. B. R. 4; In re Maher, 144 Fed. Rep. 503, 16 Am. B. R. 340; In re Marshall Paper Co. (C. C. A. 1st Cir.), 102 Fed. Rep. 872, 4 Am. B. R. 468; In re Herrman, 134 Fed. Rep. 566, 4 Am. B. R. 139, on appeal (C. C. A. 2d Cir.), 13 Am. B. R. 778.

61 See ante, Sec. 722.

62 In re Claff, 111 Fed. Rep. 506,
 7 Am. B. R. 128; In re Marshall Paper Co. (C. C. A. 1st Cir.), 102
 Fed. Rep. 872, 4 Am. B. R. 468;

discharge can not properly arise or be considered in determining the right to a discharge.<sup>63</sup> An honest bankrupt is regularly entitled to a discharge, which releases him from all his provable debts except such as are expressly excepted by the statute.<sup>64</sup>

The court will not seek for grounds for refusing a discharge unless they are properly presented by the parties.<sup>65</sup> If the parties do not raise objections, the court will consider them to consent to the discharge, or that no reason exists for not granting it. The confirmation of the composition with creditors operates as a discharge of the bankrupt.<sup>66</sup>

It has been held that a court of bankruptcy has power to amend a discharge after the term at which it was granted.<sup>67</sup>

An 'order refusing a discharge finally determines for all time in all courts, as between the parties and their privies, the facts upon which the refusal is based. It is a bar to a second application in the same bankruptcy proceedings. It is a bar to a discharge in proceedings begun in another court if proved in that proceeding and not otherwise. 88\*

Costs may be taxed to the losing party.69

In re Black, 97 Fed. Rep. 493, 4Am. B. R. 471, note.

63 In re Marshall Paper Co. (C. C. A. 1st Cir.), 102 Fed. Rep. 872, 4 Am. B. R. 468; In re Thomas, 92 Fed. Rep. 912, 1 Am. B. R. 515; In re Mussey, 99 Fed. Rep. 71, 3 Am. B. R. 592; In re Rhutassel, 96 Fed. Rep. 597, 2 Am. B. R. 697; In re Claff, 111 Fed. Rep. 506, 7 Am. B. R. 128; In re Tinker, 99 Fed. Rep. 79, 3 Am. B. R. 580. See also as to the effect of this discharge, Tinker v. Caldwell, 193 U. S. 473, 48 L. Ed. 754, 11 Am. B. R. 568.

<sup>64</sup> B. A. 1898, Sec. 17, and Sec. 1, clause 12.

65 In re Royal, 113 Fed. Rep. 146,
 7 Am. B. R. 636; In re Schuyler,

No. 12494 Fed. Cas., 3 Ben. 200; In re Rosenfield, No. 12057 Fed. Cas., 2 N. B. R. 116; In re Frey, 9 Fed. Rep. 376.

<sup>66</sup> B. A. 1898, Sec. 14c; Sec. 250, ante.

<sup>67</sup> In re Kaufman, 136 Fed. Rep. 262, 14 Am. B. R. 393.

<sup>68</sup> Bluthenthal v. Jones, 208 U. S.
64, 52 L. Ed. 390, 19 Am. B. R. 288;
In re Fiegenbaum (C. C. A. 2d
Cir.), 121 Fed. Rep. 69, 9 Am. B. R.
595; In re Royal, 113 Fed. Rep. 140,
7 Am. B. R. 636.

68\* Bluthenthal v. Jones, 208 U. S.
64, 52 L. Ed. 390, 19 Am. B. R. 288.
69 In re Chamberlain, 125 Fed.
Rep. 629, 11 Am. B. R. 95; In re
Grossman, 111 Fed. Rep. 507, 6
Am. B. R. 510; In re Young, 140

### § 741. When discharge stayed.

The discharge may be stayed to give a creditor an opportunity to enforce his rights against persons secondarily liable, 70 or for the purpose of allowing a creditor to assert in a state court a right to subject exempt property to the payment of his debt which would be released by the discharge, 71 or to await the determination in another tribunal of the validity of some act set up as a ground for the bankrupt's discharge. 74

#### § 742. Effect of discharge.

A discharge in bankruptcy is in the nature of a personal privilege granted to a debtor in consideration of his yielding up all of his property for distribution among his creditors. It does not extinguish the bankrupt's liability. It is a

Fed. Rep. 728, 15 Am. B. R. 477; In re Joseph Wolpert, 1 Am. B. R. 436 (referee.)

<sup>70</sup> In re Maher, 169 Fed. Rep. 997, 22 Am. B. R. 290, distinguishing A. Klipstein & Co. v. Allen-Miles, 136 Fed. Rep. 385, 69 C. C. A. 229.

<sup>71</sup> In re Brumbaugh, 128 Fed. Rep. 971, 12 Am. B. R. 204; In re Tiffany, 147 Fed. Rep. 314, 17 Am. B. R. 296.

In Lockwood v. Exchange National Bank, 190 U. S. 294, 300, 47 L. Ed. 1061, 10 Am. B. R. 107, the supreme court said: "There would exist in favor of a creditor holding a waiver note, like that possessed by the petitioning creditor in the case at bar, an equity entitling him to a reasonable postponement of the discharge of the bankrupt, in order to allow the institution in the state court of such proceedings as might be necessary to make effective the rights of the creditor.

Proceedings on a discharge will be stayed on the petition of a creditor who holds notes waiving the bankrupt's exemption in certain property, although the exemption was never formally set apart to the bankrupt where the creditors apparently acquiesced in it and on account of it did not prove their claims. In re Mitchell, 175 Fed. Rep. 877, 23 Am. B. R. 707. The bankruptcy court has no jurisdiction to withhold the bankrupt's discharge pending the determination of an action against him for the conversion of a note containing a waiver of exemptions where the alleged conversion is denied. In re Hartsell & Son, 141 Fed, Rep. 30, 15 Am. B. R. 177.

<sup>74</sup> In re Olansky et al., 163 Fed. Rep. 428, 20 Am. B. R. 780; In re Maher, 169 Fed. Rep. 997, 22 Am. B. R. 290. release from the unpaid balance of debts existing at the time the petition was filed, which may be pleaded in bar of any action upon a debt so released.<sup>75</sup>

A discharge does not extinguish the debts, but merely bars the remedy. The A discharge is a meritorious defense and is not more technical or less favored by the courts than other meritorious defenses. Where no discharge is granted there is no release, and the unpaid balance of a debt may be recovered. Bankruptcy proceedings alone do not operate to bar suits.

The confirmation of a composition has the same effect as a discharge.<sup>79</sup>

The discharge of a plaintiff in a state court, where the trustee did not intervene, does not abate the suit. so

Withdrawing objections to the bankrupt's discharge on the ground that a debt was created by fraudulent representations does not make the discharge an adjudication as to this, as the plaintiff's failure to object would not bar an action for fraud after the bankrupt's discharge.<sup>81</sup>

The discharge has nothing to do with the settlement of the estate, 82 and does not affect the creditor's right to set up a counterclaim to the action of the trustee. 83

It is no defense to a liability as partners that the debtors were stockholders in a corporation which had been discharged in bankruptcy.<sup>84</sup>

<sup>75</sup> See pleading a discharge, Sec. 802, *post*.

76 Dimmock v. Revere, 117 U. S. 559, 29 L. Ed. 994; Griffiths v. Adams, 95 Md. 170; Bank of Commerce v. Ellioht, 109 Wis, 648, 85 N. W. 417.

77 Citizens' Nat. Bank v. Branden, (N. D. 1910), 126 N. W. 102.

den, (N. D. 1910), 126 N. W. 102.

78 Dingee v. Becker, No. 3919 Fed.
Cas., 9 N. B. R. 508; Greenwald
v. Appell, 17 Fed. Rep. 140; Whitney v. Crafts, 10 Mass. 23. See
also In re Sweet, 36 Fed. Rep.
761.

- 75 See pleading a discharge, Sec.
  80 Griffin v. Mut. Life Ins. Co.,
  119 Ga. 664.
- 81 Standard Sewing Machine Co.
  v. Kattell, 132 N. Y. App. Div. 539,
  117 N. Y. Suppl. 32.
- 82 Rand v. Sage, 94 Minn. 344.102 N. W. 864.
- 88 Wyckoff v. Williams, 121 N.
  Y. Suppl. 189, 136 App. Div. 495.
  84 Virginia-Carolina Chemical Co.
- v. Fisher, 58 Fla. 377, 50 So. 504.

## § 743. Effect on foreign creditors.

A discharge under the national bankruptcy act of the United States operates to release a bankrupt from all his provable debts, except certain debts enumerated in the statute.<sup>85</sup>

A discharge operates as a release from any such debt or liability, wherever it has been contracted or arisen.<sup>86</sup> throughout the several states and territories of the United States.<sup>87</sup>

It may be set up as a defense in bar of any action upon a debt thereby released, in any court, either state or federal, within the United States.<sup>88</sup> The reason for this is that the territorial effect of a discharge is coextensive with the power of the legislature enacting the law. It may be possible that a foreigner can not enforce a claim in the courts of this country, although he may be able to enforce it in a foreign court.

The rule of comity of nations is that a discharge from any debt or liability under the bankrupt law of the country where the debt or liability has been contracted or has arisen, or possibly where it is to be paid or satisfied, will be recognized as a discharge or satisfaction everywhere. 89 "The rule was laid down by Lord Mansfield in Ballantine v. Golding, that what is a discharge of a debt in the country where it was contracted is a discharge of it everywhere. 90

<sup>85</sup> B. A. 1898, Sec. 17, and amendment of 1903, 32 Stat. at L. 798, and amendment of June 25, 1910; Sec. 742, ante.

86 Zarega's Case, No. 18204 Fed. Cas., 4 L. R. 480; Ruiz v. Eickerman, 5 Fed. Rep. 790; Pattison v. Wilbur, 10 R. I. 448.

But see Lizardi v. Cohen, 3 Gill. (Md.) 430; McMenomy v. Murray, 3 Johns. Chan. (N. Y.) 435.

87 Hargadine - McKittrick Dry Goods Co. v. Hudson (C. C. A. 8th Cir.), 122 Fed. Rep. 232, 10 Am. B. R. 225. 88 See pleading a discharge, Sec. 802, post.

89 Story on Conflict of Laws, Sec. 340; Dicey on Conflict of Laws, 449.

90 Lord Ellenborough in Potter v. Brown (1804), 5 East, 130.

In Ellis v. McHenry, 6 L. R. C. P. 234, Bovill, C. J. (1871), applying this principle to the British Colonies, said: "In the first place there is no doubt that a debt or liability arising in any country may be discharged by the laws of that country, and that such a discharge,

Hence a discharge obtained in a court of bankruptcy in the United States, releasing a debt or obligation contracted or incurred in the United States, will be recognized as a discharge of that debt or liability in any country. Thus where a debtor and creditor both resided in the United States, where the debt was created and where the discharge was granted, and afterwards both parties became residents of England, and a suit was there commenced against the debtor on the original indebtedness, the discharge was held a bar to recovery. The same rule with reference to a discharge in the states has been applied in Canada. The authorities seem to recognize no distinction with reference to the residence of the parties to the contract, whether between citizens or between citizens and a foreigner, or between foreigners. S

A discharge from any debt or liability under the national bankrupt act of this country will not be recognized as a release of a debt or liability which has not been contracted or arisen, and is not to be paid or satisfied in this country. 94 It has been held in England that a contract made in England

if it extinguishes the debt or liability, and does not merely interfere with the remedies or course of procedure to enforce it, will be an effectual answer to the claim, not only in the courts of that country, but in every other country. the law of England, and is a principle of private international law adopted in other countries. It was laid down by Lord King, in Burrows v. Jemino, 2 Stra. 733; by Lord Mansfield, in Ballantine v. Golding, Cook's Bk. Law, 419; by Lord Ellenborough, in Potter v. Brown, 5 East, 124; by the Privy Council, in Odwin v. Forbes, Buck. 57; in Quelin v. Moisson, 1 Knapp, 265, 6, n; by the court of Queen's Bench, in Gardner v. Houghton, 2 B. & S. 743; and by the court of

Exchequer Chamber, in Phillips v. Eyre, L. R. 6 Q. B. 1, 22 L. T. 869.

See Sexton v. Kessler & Co. (C. C. A. 2d Cir.), 172 Fed. Rep. 535, 97 C. C. A. 161, 21 Am. B. R. 807, where the proposition of the text seems to be assumed.

91 Potter v. Brown, 5 East, 124.

92 Ohlemacher v. Broek, 44 Upper Canada Rep. 366.

98 Story on Conflict of Laws, Sec. 340.

94 Lizardi v. Cohen, 3 Gill. (Md.) 430; McMenomy v. Murray 3 Johns. Chan. (N. Y.) 435; Ellis v. McHenry, L. R. 6 C. P. 228.

See also Bartley v. Hodges, 1 B. & S. 375; Story on Conflict of Laws, Sec. 342; Dicey on Conflict of Laws, 451.

is not discharged under an insolvent act of one of the United States so as to bar a suit upon contract in the English courts.<sup>95</sup>

Where a foreigner comes into court of bankruptcy for the purpose of proving a debt, he thereby submits himself to the jurisdiction of the court. A discharge in such case will probably bar the foreigner's claim asserted in either a domestic or foreign court. 96 But where a foreigner does not prove his debt in a court of bankruptcy, and has not knowledge of the proceedings, his debt is not barred in any court by the discharge.

Where a discharge does not release a debt or claim under the national bankruptcy act, such debt or claim is not released in any other country.<sup>97</sup>

### § 744. Effect of a foreign discharge on American debts.

The same principles which have been stated in the last section as governing the effect of an American discharge in a foreign country, are true with reference to the effect of a foreign discharge in the United States. Thus it has been held that a discharge under a foreign law was no bar to an action on a contract made in this country. Where a person voluntarily submits himself to the jurisdiction of the court granting the discharge, to prove his claim and participate in the proceedings, he is bound thereby, and the courts of this country will recognize the discharge as a bar to an action upon a debt released thereby. The courts of

95 Smith v. Buchanan, 1 East, 6,
11. See also Lewis v. Owen, 4 B.
& Ald. 654; Philips v. Allan, 8 B.
& Ald. 477.

98 Consult Peck v. Hibbard. 26 Vt.
698; Phelps v. Borland, 103 N.
97 B. A. 1898, Sec. 17, clause 3;
Lizardi v. Cohen, 3 Gill. (Md.)
Y. 406.

430; McMenomy v. Murray, 3 Johns. Chan. (N. Y.) 435.

98 McMillan v. McNeill, 4 Wheat. 209, 4 L. Ed. 552; Green v. Sarmiento, No. 5760 Fed. Cas., 3 Wash. C. C. 17.

99 Peck v. Hibbard, 26 Vt. 698; Phelps v. Borland, 103 N. Y. 406. this country will also recognize the binding force of a discharge under a foreign law, releasing a debt or a liability which had been contracted or had arisen in that country.

There are many cases decided in the federal and state courts which apply to discharges granted by the courts of one state when sought to be asserted against the citizens of another. These cases can not be considered authority in determining the effect of a discharge between sovereign states unrestricted by constitutional limitations. All of these cases turned upon the peculiar structure of the Constitution of the United States prohibiting the states from passing laws impairing the obligation of contracts. This limitation upon state legislatures has been discussed in another place.

### § 745. On assignment of wages.

Where a debtor assigns his unearned wages to secure a debt, a discharge releases him from having his wages earned after the adjudication applied to the payment of the debt.<sup>2</sup>

Where such assignment creates a lien it is not affected by his discharge.<sup>3</sup>

100 Gilman v. Lockwood, 4 Wall. 409. 18 L. Ed. 432; Baldwin v. Hale, 1 Wall. 223, 17 L. Ed. 531; Baldwin v. Bank, 1 Wall. 234, 17 L. Ed. 534; Ogden v. Saunders, 12 Wheat, 213, 6 L. Ed. 606; Boyle v. Zacharie, 6 Pet. 348, 8 L. Ed. 423; Felch v. Bugbee, 48 Me. 9; Anderson v. Wheeler, 25 Conn. 603; Whitney v. Whiting, 35 N. H. 457; Murphy v. Manning, 134 Mass. 488; Hicks v. Hotchkiss, 7 John. Chan. (N. Y.) 297; Van Hook v. Whitlock, 26 Wend. (N. Y.) 43; Savoye.v. Marsh, 10 Met. (Mass.) 594; Producers Bank v. Farnum, 5 Allen (Mass.) 10; Dunlap v. Rogers, 47 N. H. 281; Pierce v. O'Brien, 129 Mass. 314; Towne v.

Smith, No. 14115 Fed. Cas., 1 Wood. & M. 115.

<sup>1</sup> Sec. 11, ante.

Leitch v. Northern Pac. Ry. Co.,
95 Minn. 35, 14 Am. B. R. 409;
In re West, 128 Fed. Rep. 205, 11
Am. B. R. 782; In re Home Discount Co., 147 Fed. Rep. 538, 17
Am. B. R. 168.

See however Citizen Loan Association v. Boston & Maine Railroad, 196 Mass. 528, 82 N. E. 696, refusing to follow the above cases. As to lien created by assignment of wages, see ante, Sec. 455.

Mallin v. Wenham, 209 III. 252,
13 Am. B. R. 210, 103 III. App. 609; Citizens Loan Association v.
B. M. R. R., 196 Mass. 528, 19
Am. B. R. 650.

# § 746. On bankrupt's title and business.

The discharge has no effect on the title to the bankrupt's property,<sup>4</sup> but may have the effect of altering the business ties of the bankrupt.<sup>5</sup>

### § 747. On actions pending.

The discharge may cause the dismissal of a suit by the bankrupt, although the trustee may go on with an action after the discharge and with the bankrupt's consent even after the estate is settled, and a state officer previously appointed may proceed with an action in a state court to recover property fraudulently conveyed.

The plaintiff in an action for personal injuries may recover for doctor's and nurses' bills, although they were included in his schedules in bankruptcy and barred by his discharge. The plaintiff has a right to treat such debts as debts of honor.9\*

The bankrupt in New York has a right on his discharge to have a judgment against him canceled.<sup>10</sup>

A discharge releases the bankrupt from personal liability on an order in writing to pay salary subsequently to accrue, although the order might be enforceable as security against the employer. Mitchell v. Leland, 190 Mass. 258, 76 N. E. 670.

<sup>4</sup> The administration of the estate may go on without regard to the date of the discharge. Rand v. Sage, 94 Minn. 344, 102 N. W. 864.

<sup>5</sup> The discharge in bankruptcy of a former trustee of a corporation has the effect to prove that he had ceased all connection with the company where his stock went to his assignee in bankruptcy. Philadelphia & R. Coal & Iron Co. v. Hotchkiss, 82 N. Y. 471.

<sup>7</sup> Though the debt is not scheduled or known to the trustee. Scruby v. Norman, 91 Mo. App. 517, 519.

Stone v. Jenkins, 176 Mass. 544,
N. E. 1002.

<sup>9</sup> Osborn v. Fender, 11 Am. B. R. 224.

9\* Sibley v. Nason, 196 Mass. 125,
81 N. E. 887.

<sup>10</sup> Hussey v. Judson, 43 Misc. (N. Y.) 370, 87 N. Y. Suppl. 499. Costs should not be imposed on a bankrupt on setting aside a judgment against him as discharged. Briefer v. Johnson, 32 Misc. 764, 66 N. Y. Suppl. 477.

### § 748. On exempt property.

After a discharge of the debtor, a creditor can not enforce his debt against his exempt property, <sup>11</sup> unless a lien had been fastened on such property before the discharge was granted <sup>12</sup>

#### § 749. On liens.

The effect of a discharge is to release the personal liability only. It does not affect liens upon his property. If they are valid, under the laws of the state and the bankrupt act, they may be enforced after a discharge is granted.<sup>13</sup>

Thus a judgment which has become a valid lien on property will continue to be so, 16 especially when on exempt

11 Groves v. Osburn, 79 Pac. Rep. 500; Bell v. Dawson Grocery Co., 120 Ga. 628, 12 Am. B. R. 160; Claster v. Sable, 22 Pa. Sup. Ct. 631, 10 Am. B. R. 446; Bowen & Thomas v. Keller, 130 Ga. 54, 60 S. E. 174; Brooks v. Eblen, 32 Ky. L. Rep. 453, 106 S. W. 308.

<sup>12</sup> McKenney v. Cheney, 118 Ga.
 387, 11 Am. B. R. 54; Powers Dry Goods Co. v. Nelson, 10 N. D. 580,
 7 Am. B. R. 506.

13 Howard v. Cunliff, 10 Am. B. R. 71; Paxton v. Scott, 10 Am. B. R. 80; Stephenson v. Bird (Ala. 1910), 53 So. 93; Oliphint v. Eckerly, 36 Ark. 69, specific liens; McCall v. Herring, 116 Ga. 235, 42 S. E. 468: Philmon v. Marshall, 116 Ga. 811, 43 S. E. 48; Haggerty v. Byrne, 75 Ind. 499; Paxton v. Scott, 66 Neb. 385, 92 N. W. 611; Popham v. Narretto, 20 Hun (N. Y.) 299; Powers Dry Goods Co. v. Nelson, 10 N. D. 580, 58 L. R. A. 770, 88 N. W. 703; Woods v. Klein, 223 Pa. St. 256, 72 Atl. 523 (four months' old).

The discharge stops personal liability on a mortgage four months' old, but does not affect proceedings to foreclose the mortgage itself. Evans v. Rounsaville, 115 Ga. 684, 42 S. E. 100; Smith v. Zachery, 115 Ga. 722, 42 S. E. 102.

Where the debt of an attaching creditor within the four months' period might have been proven in the bankruptcy proceedings, the bankrupt's discharge when properly pleaded is a bar to any action to recover the same. Wood v. Carr, 10 Am. B. R. 577.

16 Blum v. Ellis, 73 N. C. 293; Peck v. Jenness, 7 How. 612, 12 L. Ed. 841; Crosby v. Wentworth, 48 Mass. 10; McCullough v. Caldwell. 5 Ark. 237; Grandin v. First Nat. Bank, 98 N. W. Rep. 70; Bassett v. Thackara, 72 N. J. L. 81, 60 Atl. Rep. 39; Marx v. Hart, 166 Mo. 503, 8 Am. B. R. A. 438n; Smith v. Zachery, 115 Ga. 722, 8 Am. B. R. 240; McCance v. Taylor, 10 Grat. (Va.) 580; Bates v. Tappan, 99 Mass. 376; Bowman v. Harding, 56

property, <sup>18</sup> but if the judgment is merely a personal liability it is released by a discharge. In an action to enforce a mechanic's lien or mortgage, the discharge will not bar the proceedings except as to a personal judgment for a deficiency. <sup>19</sup> A lien created by the levy of an execution more than four months before bankruptcy is not affected by the discharge of the defendant. <sup>20</sup> A vendor's lien for the purchase price of property sold may be enforced after a discharge, provided such lien is recognized by the state laws. <sup>21</sup> Nor can a discharge be pleaded when the question in issue is one of title to property. <sup>22</sup>

The lien of a mortgage given more than four months before bankruptcy is not discharged.<sup>23</sup>

Where property of the bankrupt has been attached by legal proceedings prior to the period of four months next preceding the commencement of proceedings in bankruptcy, a

Me. 559; Leighton v. Kelsey, 57 Me. 85; Ingraham v. Phillips, 1 Day (Conn.) 117; Jones v. Lellyett, 39 Ga. 64; Camp v. Young, 119 Ga. 981, 47 S. E. 560, when holder of judgment has not proved his debt; Doyle v. Hall, 86 Ill. App. 163; Pinkard v. Willis (Texas, 1900), 57 S. W. 891; McCance v. Taylor, 10 Gratt. (Va.) 580. See further Sec. 427, ante.

<sup>18</sup> F. Mayer Boot & Shoe Co. v. Ferguson (N. D. 1910), 126 N. W. 110.

<sup>19</sup> Second Nat'l Bank v. State Nat'l Bank, 10 Bush. (Ky.) 367; Reed v. Bullington, 49 Miss. 223; Scott v. Ellery, 142 U. S. 381, 35 L. Ed. 1050; Pierce v. Wilcox, 40 Ind. 70; Roberts v. Wood, 38 Wis. 60; Stewart v. Anderson, 10 Ala. 504; Truitt v. Truitt, 38 Ind. 16; City Bank v. Walton, 5 Rob. (La.) 158; Holland v. Cunliff, 96 Mo. App. 67, 10 Am. B. R. 71; Copper Belle Mining Co. v. Costello (Ariz. 1909),

100 P. 807; Morganstein v. Commercial National Bank, 125 Ill. App. 397; Catterlin v. Armstrong, 101 Ind. 258; Prentis v. Armstrong, 118 Mich. 259, 76 N. W. 381, 5 Detroit Leg. N. 494, personal deficiency decree barred—can only be entered on notice to give bankrupt an opportunity to plead his discharge.

<sup>20</sup> Philmon v. Marshall, 116 Ga. 811, 11 Am. B. R. 180; see further Sec. 447, ante.

<sup>21</sup> Lewis v. Hawkins, 23 Wall. 119, 23 L. Ed. 113; Bassett v. Thackara, 72 N. J. L. 81, 60 Atl. Rep. 39. In Graham v. Richerson, 115 Ga. 1002, 8 Am. B. R. 700, it was held that no vendor's lien existed in the state. As to vendor's liens, see further Sec. 487, ante.

<sup>22</sup> Berry v. Jackson (Ga.), 8 Am.B. R. 485.

<sup>23</sup> Evans v. Rounsaville, 115 Ga. 684, 8 Am. B. R. 236. As to lien of mortgage, see further Sec. 469, et seq., ante.

judgment may be entered in the court in which such judgment is pending, to be enforced against the property attached, even though the discharge is pleaded in bar of the further maintenance of the judgment suit.<sup>24</sup>

So judgment may be taken against the bankrupt with perpetual stay of execution to enable the creditor to proceed on an attachment bond given more than four months before bankruptcy.<sup>25</sup> In such cases the judgment can not be enforced against the person of the bankrupt. It was held under the former act that where a suit has been begun before a petition in bankruptcy had been filed, a person might prosecute a suit to enforce a lien upon property fraudulently conveyed by the bankrupt, even though a discharge is pleaded in bar of the suit,<sup>26</sup> and the same rule is followed to-day as to a lien to enforce a creditor's bill,<sup>27</sup> or to an action by the trustee to set aside fraudulent conveyances as the discharge is personal only to the bankrupt,<sup>30</sup> but where the lien

<sup>24</sup> Doe v. Childress, 21 Wall. 642, 22 L. Ed. 549; Bates v. Tappan, 99 Mass. 376; Ingraham v. Philips, 1 Day (Conn.) 117; Bowman v. Harding, 56 Me. 559; Leighton v. Kelsey, 57 Me. 85. See also In re Marshall Paper Co., 102 Fed. Rep. 872, 4 A. B. R. 468; In re Remington Motor Co., 119 Fed. Rep. 141, 9 Am. B. R. 533; Wakeman v. Throckmorton, 74 Conn. 616, 51 A. 554; Barnstable Savings Bank v. Higgins, 124 Mass. 115; Davenport v. Tilton, 10 Metc. (Mass.) 320; Bosworth v. Pomeroy, 112 Mass. 293; Stockwell v. Silloway, 113 Mass. 382; Johnson v. Collins, 116 Mass. 392.

<sup>25</sup> Kendrick & Roberts v. Warren Bros. Co., 110 Md. 47, 72 A. 461.

<sup>26</sup> Fetter v. Cirode, 4 B. Mon.
(Ky.) 482; Payne v. Able, 7 Bush.
(Ky.) 344; Lowry v. Morrison, 11
Paige (N. Y.) 327.

<sup>27</sup> Wahlheimer v. Truslow, 106 N.

Y. App. Div. 73, 94 N. Y. Suppl. 137.

A fraudulent grantee can not plead the subsequent discharge of his grantor as a defense in a creditor's suit brought more than four months prior to the institution of the bankruptcy proceeding, and which pertains to land which was never brought within the jurisdiction of the bankruptcy court. Flint v. Chaloupka, 78 Neb. 594, 11 N. W. 465, 18 Am. B. R. 293.

A creditor can not maintain suit to set aside a conveyance as fraudulent though made more than four months before bankruptcy. His debt is barred by the discharge and the trustee must proceed. Ruhl-Knoblegard Co. v. Gillespie, 61 W. Va. 584, 56 S. E. 898.

<sup>30</sup> Paxton v. Scott, 66 Neb. 385, 92 N. W. 611.

is actually created after the discharge on a suit pending before the discharge, the lien is avoided by the discharge.<sup>31</sup>

#### § 750. On trusts.

A creditor's action to enforce a resulting trust is not affected by the discharge.<sup>32</sup>

### § 751. In a second proceeding.

Debts from which a discharge was denied under a former bankrupt act,<sup>33</sup> or insolvency proceedings,<sup>84</sup> are provable and released by a discharge in bankruptcy.

A discharge obtained in a new proceeding will not release debts provable in a former proceeding under the bankrupt act of 1898, where the bankrupt failed to obtain a discharge in that proceeding. The undischarged debts are provable in the new proceeding. The reason that they are not released by a discharge is that the failure to obtain a discharge in the former proceeding is *res judicata* as to whether or not the bankrupt is entitled to be discharged from the claims of the creditors scheduled and provable in the former proceeding.<sup>37</sup>

<sup>31</sup> Phillip Carey Manufacturing Co. v. Viaduct Place, 1 Ga. App. 707, 58 S. E. 274.

32 Evans v. Staalle, 88 Minn. 253,
92 N. W. 951, 11 Am. B. R. 182.
33 In re Herrman, 102 Fed. Rep.
753, 4 Am. B. R. 139, affirmed (C. C. A. 2d Cir.), 106 Fed. Rep. 987.
34 In re Bybee, 124 Fed. Rep.
1011, 10 Am. B. R. 761; Dean v.

Justices, 173 Mass. 453, 2 Am. B. R. 163, 53 N. E. 893.

35 Bluthenthal v. Jones, 208 U. S. 64, 52 L. Ed. 390, 19 Am. B. R. 288; Kuntz v. Young (C. C. A. 8th Cir.), 131 Fed. Rep. 719, 12 Am. B. R. 505; In re Claff, 111 Fed. Rep. 506, 7 Am. B. R. 128; In re Driscoe, No. 4090 Fed. Cas., Low. 430; In re Wientraub, 133 Fed. Rep.

1000, 13 Am. B. R. 711; In re Silverman (C. C. A. 2d Cir.), 157 Fed. Rep. 675, 85 C. C. A. 224, 19 Am. B. R. 460.

An order dismissing the second bankruptcy and enjoining its further prosecution is too broad where it prevents the proceeding going on as to some debts scheduled which were not provable in the first proceeding. In re Kuffler (C. C. A. 2d. Cir.), 151 Fed. Rep. 12, 61 C. C. A. 259, 18 Am. B. R. 16.

<sup>37</sup> Bluthenthal v. Jones, 208 U. S. 64, 52 L. Ed. 390, 19 Am. B. R. 288; Kuntz v. Young (C. C. A. 8th Cir.), '131 Fed. Rep. 719, 12 Am. B. R. 505; *In re* Weintraub, 133• Fed. Rep. 1000, 13 Am. B. R. 711.

A debt proved in the first proceeding and put in judgment thereafter is not a new debt, so as to entitle the bankrupt in the second bankruptcy to retry his right to a discharge therefrom.<sup>38</sup>

A mere failure to apply for a discharge in the first proceeding within the time limited is in effect a judgment by default against the right to a discharge.<sup>39</sup> If this were not so, a bankrupt, who failed to apply for a discharge within the time specified in the statute, by filing a new petition for the purpose of obtaining a discharge only, could thereby avoid the statutory limitation as to time within which to apply for a discharge. If a bankrupt was denied a discharge in the first proceeding, he might file a petition, and, because the defense set up in the first proceeding to the granting of the discharge, as a fraudulent transfer within four months of bankruptcy or a false oath or account in the first proceeding, could not be made in the second proceeding, be able to obtain a discharge from the very debts which the court had held should not be released. If the same defenses could be made, it would require the creditors to litigate again a question already settled. The reason that res judicata does not apply to prevent a release of debts, provable in a proceeding under a former bankrupt act, or in insolvency proceedings, is that the issue is not the same. A bankrupt might not be entitled to a discharge under these acts, and yet be entitled to one under the act of 1898.

<sup>88</sup> In re Kuffler, 155 Fed. Rep. 1018, 19 Am. B. R. 181.

<sup>39</sup> In re Bramlett, 161 Fed. Rep. '588, 20 Am. B. R. 402; Re Von Borries, 168 Fed. Rep. 718, 21 Am. B. R. 849; In re Stone, 172 Fed. Rep. 947, 22 Am. B. R. 895. In re Levenstein, 180 Fed. Rep. 957, 24 Am. B. R. 822; Pollet v. Cosel (C. C. A. 179 Fed. Rep. 488, 103 C. C. A. 68, 24 Am. B. R. 678.

The bankrupt should be enjoined from making any application in the second proceeding for a discharge from debts listed in the first petition. *In re* Pullian, 171 Fed. Rep. 595, 32 Am. B. R. 513.

The second petition for adjudication should be dismissed where there are no assets, and the same debts are scheduled, and no others. Creditors who prove their claims in the second proceeding are not estopped from pleading as a ground for their dismissal that the bankrupt was not entitled to a discharge. *In re* Elby, 157 Fed. Rep. 935, 19 Am. B. R. 734.

A voluntary proceeding in bankruptcy for the sole purpose of obtaining a discharge, which a prior involuntary proceeding has conclusively determined that the bankrupt is not lawfully entitled to, presents no ground for relief and should be dismissed. If new debts have been created since the first proceeding a different case is presented. The bankrupt may be entitled to a discharge releasing him from these debts. A discharge in a second proceeding will not have the effect of releasing debts from which the bankrupt has failed to apply for, or has been denied a discharge in a former proceeding. This will not prevent granting a discharge for what it is worth.

The creditor to protect himself should appear in the second proceedings and prove the order refusing the discharge in the first proceedings, otherwise he is bound by the second discharge,<sup>46</sup> unless it appears he had no notice of the second proceedings.<sup>47</sup>

### § 752. In what court the effect of a discharge is determined.

A discharge in bankruptcy discharges the bankrupt from all debts and claims which are made provable against his estate, and which existed on the day the petition was filed, excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.<sup>48</sup>

<sup>48</sup> Kuntz v. Young (C. C. A. 8th Cir.), 131 Fed. Rep. 719, 12 Am. B. R. 505; *In re* Fiegenbaum (C. C. A. 2d Cir.), 121 Fed. Rep. 69, 9 Am. B. R. 595; *In re* Kuffler, 144 Fed. Rep. 445, 16 Am. B. R. 305; *In re* Weintraub, 133 Fed. Rep. 1000, 13 Am. B. R. 711.

44 Kuntz v. Young (C. C. A. 8th Cir.), 131 Fed. Rep. 719, 12 Am. B. R. 505.

<sup>45</sup> In re Claff, 111 Fed. Rep. 506, 7 Am. B. R. 128.

<sup>46</sup> Bluthenthal v. Jones, 51 Fla. 396, 41 S. 533, 208 U. S. 64, 52 L. Ed. 390, 19 Am. B. R. 288.

47 Where a bankrupt is refused a discharge upon the opposition of a judgment creditor who had no personal knowledge of the second bankruptcy, because his address, though appearing in the city directory was misstated, the judgment creditor's default on subsequent motion to discharge the debt under the New York Code will be opened. It further appeared that no notice of the default was given. Matter of Quackenbush, 122 App. Div. 456, 19 Am. B, R. 647.

48 Official Form No. 59; see Form No. 164, post.

The court of bankruptcy decides whether or not a discharge shall be granted, and, if granted, it has the sole power to entertain a proceeding to vacate the same. It does not construe the extent of the discharge with reference to particular debts of the bankrupt.<sup>49</sup>

That inquiry is properly to be made only by the court in which a direct suit on the debt is pending, and when the discharge is properly pleaded in bar of the particular debt.<sup>51</sup>

The court in which such a direct suit is pending and the discharge pleaded does not modify the order of the court of bankruptcy. Its inquiry should be, is the debt sued on a debt which is released by the discharge pleaded? If it is released under the bankrupt act, the plea should be sustained and the action dismissed. If such court determines that it is a debt not released by the discharge, the plea is bad and should be overruled.

## § 753. Validity—Collateral attack.

The discharge is valid although the petition was filed to avoid a particular debt.<sup>52</sup> The order of discharge can not be questioned or attacked collaterally in any other court, either

<sup>49</sup> In re Mussey, 99 Fed. Rep. 71, 3 Am. B. R. 592; In re Marshall Paper Co. (C. C. A. 1st Cir.), 102 Fed. Rep. 872, 4 Am. B. R. 468; In re Thomas, 92 Fed. Rep. 912, 1 Am. B. R. 515; In re Rhutassel, 96 Fed. Rep. 597, 2 Am. B. R. 697; In re Claff, 111 Fed. Rep. 506, 7 Am. B. R. 128.

The claim that a debt was for misappropriation of funds while acting as trustee should be urged in the bankruptcy proceedings to prevent an order of discharge against that particular debt, but it can not be used to except from the operation of the order claims that were plainly included within it.

Delta County Bank v. McGranahan, 37 Wash. 307, 79 P. 796.

<sup>51</sup> In re Rosenberg, No. 12054 Fed. Cas., 3 Ben. 14.

In re Wright, No. 18065 Fed. Cas., 2 Ben. 509, Judge Blatchford said: "There is nothing in the proof of debt in this case which can in any manner conclude or prejudice any party in any tribunal so far as regards the issue of fraud in contracting the debt." Santa Rosa Bank v. White, 139 Cal. 703, 73 P. 577; Forsyth v. Vehmeyer, 177 U. S. 177, 44 L. Ed. 723.

Finnegan v. Hall, 35 Misc.
 (N. Y.) 773, 72 N. Y. Suppl. 347.

state or federal,<sup>58</sup> except for, want of jurisdiction,<sup>54</sup> even on the ground of fraud in obtaining it,<sup>56</sup> or for willful concealment of assets,<sup>57</sup> or for lack of notice of the petition, especially where notice by publication took place.<sup>57\*</sup>

#### § 754. What debts are released by a discharge. 58

A discharge in bankruptcy releases a bankrupt from all of his provable debts,<sup>59</sup> except such as (1) are due as a tax levied by the United States, the state, county, district or municipality in which he resides; (2) are liabilities for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another, or for alimony due or to become due,

58 Corey v. Ripley, 57 Me. 69; Oates v. Parish, 47 Ala. 157; Ocean National Bank v. Olcott, 46 N. Y. 12; Dusenbury v. Hoyt, 53 N. Y. 521; Reed v. Bullington, 49 Miss. 223; Way v. Howe, 108 Mass. 502; Alston v. Robinett, 37 Tex. 56; Beardsley v. Hall, 36 Conn. 270; Smith v. Ramsey, 27 O. S. 339; Seymour v. Street, 5 Neb. 85; Com. mercial Bank of Manchester v. Buckner, 20 How. 108, 15 L. Ed. 362; Black v. Blazo, 117 Mass. 17; Parker v. Atwood, 52 N. H. 181; Hoskins v. Velasco National Bank, 48 Tex. 246, 107 S. W. 598; Boyd v. Olvey, 82 Ind. 294.

But see Batchelder v. Low, 43 Vt. 662; Poillon v. Lawrence, 77 N. Y. 208.

54 A petition for a discharge in pankruptcy is an independent proceeding from the proceeding in pankruptcy and the validity of the adjudication can not be collaterally impeached, except by showing that it was made by a court not having any jurisdiction. The claim that

the bankrupt is an infant is no ground for attacking the adjudication. In re Walrath, 175 Fed. Rep. 243, 24 Am. B. R. 541.

The fact of proof of claim and receiving dividends on a non-dischargeable debt does not preclude creditor from suing the bankrupt for the balance of the claim, and such is not a collateral attack on the discharge. Katzenstein v. Reid, 16 Am. B. R. 740.

56 Wiley v. Pavey, 61 Ind. 457, 28 Am. St. Rep. 677; Seymour v. Street, 5 Neb. 85; Hibbard v. Henderson, 44 Oreg. 318, 75 P. 889. But see under the act of 1841, Tichenor v. Allen, 13 Gratt. (Va.) 15.

<sup>57</sup> Parker v. Atwood, 52 N. H. 181. But see under the act of 1841, Tichenor v. Allen, 13 Gratt. (Va.) 5. <sup>57\*</sup> Wiley v. Pavey, 61 Ind. 457, 28 Am. St. Rep. 677.

<sup>58</sup> Effect of discharge in partner-ship, see Sec. 278, ante.

<sup>59</sup> B. A. 1898, Sec. 17, as amended Feb. 5, 1903, 32 Stat. at L. 797.

or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer in any fiduciary capacity.

The inquiry of the court, to which is presented the question of whether a debt is barred or not, should be, *first*, is the debt one which was provable in bankruptcy? And, *second*, is such debt included in the exceptions specified in Section 17? If the debt was provable and not included in the exceptions it is released by a discharge.

It is not necessary that the creditor actually proved his claim in the proceedings.<sup>59</sup>\* If it was provable, it is released, although it was disallowed, as where the creditor did not surrender a preference or the debt was barred by statute of limitations.<sup>60</sup>

An unliquidated claim, which might have been liquidated and proved under Section 63b, is discharged.<sup>61</sup> The liability of the maker of a note to the surety is a provable claim against the maker's estate and the surety's claim is barred by the maker's discharge.<sup>63</sup>

If a debt was not provable it is not released by a discharge.<sup>64</sup> In order therefore to be discharged, it must come

59\* Bluthenthal v. Jones, 208 U. S.
64, 52 L. Ed. 390, 19 Am. B. R. 288.
60 Hargardine - McKittrick Dry
Goods Co. v. Hudson (C. C. A.
8th Cir.), 122 Fed. Rep. 232, 10 Am.
B. R. 225; In re Kuffler, 153 Fed.
Rep. 667, 18 Am. B. R. 587.

As to the distinction between provable and allowable claims, see *In re* Hornstein, 122 Fed. Rep. 266, 10 Am. B. R. 308.

<sup>61</sup> In re Hilton, 104 Fed. Rep. 981, 4 Am. B. R. 774.

The discharge is not a bar to an action continued only for the purpose of "liquidating" the amount of the claim. Latimer v. McKinnon, 85 N. Y. App. Div. 275, 83 N. Y. Suppl. 320.

<sup>63</sup> Hayer v. Comstock, 115 Ga. 187, 7 Am. B. R. 493.

<sup>64</sup> Wetmore v. Markoe, 196 U. S.
68, 49 L. Ed. 390, 13 Am. B. R.
1; Dunbar v. Dunbar, 190 U. S.
340, 47 L. Ed. 1084, 10 Am. B. R.
139; Audubon v. Shufeldt, 181 U.

within one of the classes enumerated in the statute as being provable against the estate of the bankrupt.<sup>65</sup> What debts are provable against the debtor's estate in bankruptcy is considered at length elsewhere.<sup>66</sup> An unliquidated claim for damages for tort is not a provable claim and therefore is not released by a discharge.<sup>67</sup> A judgment for damages in tort obtained prior to bankruptcy is not provable or released by a discharge.<sup>68</sup> The liability of a sheriff for the escape of the bankrupt is not a debt owed by the bankrupt and therefore is not released by a discharge.<sup>69</sup> Only such debts as are in existence at the time of filing the petition are discharged.<sup>70</sup>

The statutory exceptions and the classes of debts not released by a discharge are further considered hereafter.<sup>71</sup>

## § 755. Contempt—Moral duty.

Judgments and decrees are not released where they are in the nature of penalties or fines, imposed for wrongful or criminal acts, or to enforce a moral or natural duty. Such are judgments imposing a fine for contempt.<sup>72</sup>

## § 756. Costs—Civil and criminal.

Costs of suit incurred after the adjudication are not barred by the discharge.<sup>78</sup> Costs accruing in a criminal

S. 577, 45 L. Ed. 1009, 5 Am. B. R. 829; Clemons v. Brim (N. Y. Sup. Ct. App. Div.), 7 Am. B. R. 714; Murray v. DeRottenham, 6 John. Chan. (N. Y.) 52; Monroe v. Upton, 50 N. Y. 593; Genn v. Howard, 65 Md. 40; Bush v. Cooper, 18 How. 82, 15 L. Ed. 273; Riggin v. Magwire, 15 Wall. 551, 21 L. Ed. 232; Porter v. Lazear, 109 U. S. 84, 27 L. Ed. 865.

- 65 B. A. 1898, Sec. 63.
- 66 See provable debts, Chap. XIX.
- 67 See Sec. 325, ante.
- 68 See Sec. 325, ante.
- 69 Baer v. Grell (N. Y. Mun. Ct.), 6 Am. B. R. 428.

- 70 In re Burka, 104 Fed. Rep. 326,5 Am. B. R. 12.
  - 71 Sec. 757, et seq., post.
- 72 People v. Spalding, 10 Paige (N. Y.), 284, 4 How. 21; Macey v. Jordan, 2 Den. (N. Y.) 570. See also In re Moore, 111 Fed. Rep. 145, 6 Am. B. R. 590; but see In re Alderson, 98 Fed. Rep. 588, 3 Am. B. R. 544; In re Koronsky (C. C. A. 2d. Cir.), 170 Fed. Rep. 719, 21 Am. B. R. 851, 96 C. C. A. 39; In re Hall, 170 Fed. Rep. 721, 22 Am. B. R. 498, 96 C. C. A. 39.
- 73 Aiken v. Haskins, 34 Misc.
   (N. Y.) 505, 70 N. Y. Suppl. 293,
   6 Am. B. R. 46.

prosecution are not a penalty and there is no reason based on public policy why they should not be barred by the discharge. 74

## § 757. Judgments.

A discharge releases all judgments, provable in bank-ruptcy, except such as are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another. Subject to these exceptions, judgments entered prior to the filing of the petition, granted in actions founded in contract, are discharged. A verdict is not a judgment, and the report of a referee or master is equivalent to the verdict of a jury.

The record is decisive as to the character of the claim on which judgment was taken and can be affected by oral evidence only in case of ambiguity.<sup>79</sup>

Where a judgment is made up in part of items barred by the discharge and in part not, the demand having been put in such shape that the part of it not barred by the discharge is indistinguishably mingled with other demands not of

<sup>74</sup> Olds v. Forester, 126 Iowa, 156, 102 N. W. 419.

<sup>75</sup> B. A. 1898, Sec. 17, clause 2. As to what judgments are provable, see Secs. 296 and 297, ante.

<sup>76</sup> B. A. 1898, Sec. 63, clause 1;
Sec. 115, ante; Blake v. Bigelow, 5
Ga. 437; Comstock v. Grout, 17 Vt.
512; In re Comstock, 22 Vt. 642;
In re Sidle, No. 12844 Fed. Cas., 2
N. B. R. 220; Duncan v. Hargrove,
22 Ala. 150; Kruegel v. Murphy &
Bolanz (Tex. Civ. App. 1910), 126
S. W. 680.

77 Kellogg v. Schulyer, 2 Denio (N. Y.) 73; Nassau v. Parker, 2 Penn. L. Jour. 298; Audubon v. Shufeldt, 181 U. S. 575, 45 L. Ed. 1009, 5 Am. B. R. 829; Barkley v. Barkley, 184 Ill. 375.

78 Grooch v. Gridley, 6 Hill(N. Y.), 250.

<sup>79</sup> Peters v. United States (C. C. A. 7th Cir.), 177 Fed. Rep. 885, 101 C. C. A. 99, 24 Am. B. R. 206; Donald v. Kell, 111 Ind. 1, 11 N. E. 7\$2. See further Flanagan v. Peterson, 42 Tex, 1.

that nature and as to which the discharge is a bar, the defendant is not entitled to set up the discharge.<sup>80</sup>

# § 758. Judgments rendered after filing petition.

Judgment founded upon provable debts, which have been entered after the filing of the petition and before the consideration of the bankrupt's application for a discharge, are released to the same extent as judgments entered prior to the commencement of the bankruptcy proceedings. Such judgments are made provable debts under the present act, and therefore discharged under Section 17.81

Where a judgment is entered after the filing of the petition and before the adjudication, it can not be attacked by motion to vacate it. Section 67f applies only to the lien of judgments. "The judgment itself may remain until it is ascertainable whether the bankrupt will or will not be discharged. In case of a discharge of the bankrupt the judgment is released. In case of the failure of the bankrupt to obtain his discharge, the judgment remains. But even in the latter event it can never be enforceable against any property owned by the bankrupt at the time he filed his petition in bankruptcy, but can only be used against afteracquired property. This view in respect to the entry of a judgment after the filing of the petition in bankruptcy, as well as in regard to the force of such judgment as a lien, is supported by the provisions of Section 63a, subdivision 5 of the bankrupt act. Debts of the bankrupt may be proved and allowed against his estate which are founded upon provable debts reduced to judgment after the filing of the petition, and before the consideration of the bankrupt's application for discharge, less costs incurred and interest accrued after the filing of the petition, and up to the time of the

<sup>80</sup> Cooke v. Plaisted, 181 Mass. 82,62 N. E. 1054.

<sup>81</sup> B. A. 1898, Sec. 63, clause 5;
Sec. 297, ante; Nation v. Jones, 3
Ga. App. 83, 59 S. E. 330; Cavan-

augh v. Fenley, 94 Minn. 505, 103 N. W. 711, 110 Am. St. Rep. 382; Walker v. Muir, 194 N. Y. 420, 87 N. E. 680 (affirming 127 N. Y. App. Div. 163, 111 N. Y. Suppl. 465).

entry of such judgment. Here is a recognition of judgments entered between the filing of the petition and the application for discharge; while the provision respecting the provability of debts so reduced to judgment, less costs and interest accrued after the filing of the petition is an implied negation of the existence of any lien to be obtained in any manner against the bankrupt's property by force of such judgment.<sup>82</sup>

Under the act of 1867 there was a conflict of opinion among the judges as to whether a judgment entered after the commencement of bankruptcy proceedings and before the discharge was granted was a provable debt or not. Some judges held that the original debt was merged in the judgment and the original debt extinguished; and some judges held to the contrary. The supreme court finally held that, notwithstanding the change in its form from that of a simple contract debt or unliquidated claim, or whatever its character may have been, by merger, into a judgment of a court of record, it still remained the same debt on which the action was brought and the existence of which was provable in bankruptcy and therefore discharged.<sup>83</sup>

Where a judgment is entered upon a debt, whether provable or not, after a discharge has been granted, it is not released by the discharge. The reason for this is that the discharge does not extinguish the debt and can only be used as a defense to the action. Where it is not set up as a defense it is waived. If the discharge is pleaded and the judgment rendered against the bankrupt the adjudication is in effect that the discharge is not a sufficient defense.

<sup>82</sup> Per Reed V. C. in Kinmouth v. Braeutigam, 63 N. J. Eq. 103, 52 A. 226, 227.

88 Boynton v. Ball, 121 U. S. 457, 466, 30 L. Ed. 985; Blair v. Carter, 78 Va. 621. See *In re* Kuffler, 155 Fed. Rep. 1018, 19 Am. B. R. 181, putting a claim in judgment does not make it a new debt. See Mulhagen v. Carter, 6 Ky. L. Rep. 735.

84 Dimock v. Revere Copper Co.,

117 U. S. 559, 29 L. Ed. 994; Mc-Donald v. Davis, 105 N. Y. 508; Park v. Casey, 35 Tex. 536; Mechanics Bank v. Hazard, 9 Johns. (N. Y.) 392; Desobry v. Morange, 18 Johns. (N. Y.) 336.

Howe v. Noyes, 47 Misc. (N. Y.) 338, 93 N. Y. Suppl. 476; Stevens v. Meyers, 72 N. Y. App. Div. 128, 76 N. Y. Suppl. 332, entered on stipulation. See DeMarco v. Mass,

#### § 759. Debts due the government.

The act expressly excepts from the effect of a discharge debts due as taxes levied by the United States, the state, county, district or municipality in which the bankrupt resides.<sup>86</sup>

Whether a debt due the United States, or one of the states, other than taxes, is released by a discharge under the present act, is not free from difficulty. It was held that a debt due the United States was not barred by a bankrupt's certificate of discharge under the act of 1800,88 or under the act of 1867,89 where it was extended to a surety on the bond of a public officer.90 The ground of this rule was that a discharge will not release the debtor from a debt due the sovereign, unless the sovereign is expressly named in the clause relating to discharge of debts. This rule is recognized in England.91

The leading case in this country upon this subject is United States v. Herron.<sup>92</sup> The reasoning of the court in that case would appear to apply with equal force to the act of 1898. There are, however, two points of distinction to be noted between the act of 1867 and the act of 1898 with reference

31 Misc. (N. Y.) 827, 64 N. Y. Suppl. 768, where the discharge was not pleaded the judgment will be vacated only on paying costs.

See also pleading a discharge, Sec. 802, post.

<sup>86</sup> B. A. 1898, Sec. 17, clause 1. The United States is in no way affected by the bankruptcy act and can pursue the usual remedies and obtain its priorities without regard to the act. Lewis v. United States, 92 U. S. 618; *In re* Stoever, 127 Fed. Rep. 394, 11 Am. B. R. 345.

88 United States v. King, No. 15536 Fed. Cas., Wall. Sen. 13.

Wall. 251, 22 L. Ed. 275; United States v. Rob Roy, No. 16179 Fed. Cas., 1 Woods, 42; Smith v. Hod-

son, 50 Wis. 279; Hamilton v. Reynolds, 88 Ind. 191.

<sup>90</sup> United States v. Herron, 20 Wall. 251, 22 L. Ed. 275, overruling United States v. Throckmorton, No. 16516 Fed. Cas., 8 N. B. R. 309; United States v. Davis, No. 14929 Fed. Cas., 3 McLean, 483.

<sup>91</sup> Anon., 1 Atk. 262; Rex v. Pixley, Bunbury, 202; Craufurd v. Attorney General, 7 Price, 5; I Deacon's Bankruptcy, 784.

Section 150 of the English bankruptcy act of 1883, 46 and 47 Vic., Chap. 52, provides that "save as herein provided the provisions of this act relating to . . . a discharge shall bind the Crown."

92 20 Wall, 251, 22 L. Ed. 275.

to this opinion. In the act of 1867 there was no provision in the clause relating to discharges with reference to the United States, but the fifth class of claims entitled to priority 93 provided that "nothing contained in this title shall interfere with the assessment and collection of taxes by the authority of the United States or any state." It is clear that that provision is the same in import as clause 1 of Section 17 of the present act. The only difference noticeable is the position the clauses occupy in the two acts. In the act of 1898 it is in the section relating to discharges. Does this rule expressio unius, exclusio alterius apply to exclude all debts due the United States except for taxes?

In Section 57j the act provides that debts owing to the United States, a state, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law. This provision is a limitation upon the rights of the sovereign. Were it not for this provision the debtor would be liable for the whole amount of the penalty. It can not be contended but what the United States may or may not prove its debts in the bankruptcy proceedings.<sup>94</sup>

It would seem, therefore, that these two points of difference can hardly be urged as sufficient to take the present act out of the general rule announced and followed in U. S. v. Herron. It would seem that if Congress had intended a departure from the general rule relating to the sovereign not being bound by the provisions of a bankrupt statute, which has long been recognized in England and in this country, it would have expressed its intention more clearly in this respect.

<sup>98</sup> R. S. Sec. 5101, which embraces a part of Sec. 28 of the original act.
94 Lewis v. The United States, 92
U. S. 618, 23 L. Ed. 513; Bayne

v. United States, 93 U. S. 642, 23 L. Ed. 997; Harrison v. Sterry, 5 Cranch. 289, 3 L. Ed. 104.

By a similar course of reasoning many of the state courts reached the same conclusion with reference to debts due a state. Such debts were held not barred by a discharge in bankruptcy either under the act of 1841 or the act of 1867,95 and the same rule has been followed under the act of 1898,96

# § 760. Liabilities for obtaining property by false pretenses or representations.98

As originally enacted clause 2 of Section 17 provided "that judgments in actions for frauds, or obtaining property by false pretenses or false representations," are not released by a discharge.

This provision was held to apply to judgments alone and not to affect simple contract debts not reduced to judgment. The judgment must have been obtained in an action for fraud or for obtaining property by false pretenses or by false representations. But the supreme court said that "a correct

95 Commonwealth v. Hutchinson, 10 Pa. St. 466; Saunders v. The Commonwealth, 10 Grat. (Va.) 494; Connecticut v. Shelton, 47 Conn. 400; Johnson v. The Auditor, 78 Ky. 282. But see Jones v. The State, 28 Ark. 119.

<sup>96</sup> A fine imposed by a state court on a bankrupt for contempt is not discharged by the bankruptcy, although the fine is imposed after the filing of the petition in bankruptcy, and while the bankrupt relied upon a stay of proceedings from the bankruptcy court. *In re* Hall, 170 Fed. Rep. 721, 22 Am. B. R. 498, 96 C. C. A. 39.

A fine for contempt for attempting to deceive a state court is not a debt which is released by a discharge in bankruptcy. The fine was imposed before the filing of the petition in bankruptcy. The court in

this case relied upon Spalding v. New York, 4 Howard (11 L. Ed. 858), 21. *In re* Koronsky (C. C. A. 2d Cir.), 170 Fed. Rep. 719, 21 Am. B. R. 851, 96 C. C. A. 39.

See Olds v. Forrester, 126 Iowa, 156, 102 N. W. 419 (judgment in criminal case for costs is not a debt due as taxes and is dischargeable).

<sup>98</sup> See as to obtaining goods on credit, Sec. 730, ante.

99 Crawford v. Burke, 195 U. S. 176, 49 L. Ed, 147, 12 Am. B. R. 659; Howe v. Noyes, 93 N. Supp. 476, 15 Am. B. R. 103; Smith & Wallace Co. v. Lambert, 69 N. J. L. 487; Morse & Rogers v. Kaufman, 138 Va. 218, 7 Am. B. R. 549.

100 Hargardine - McKittrick Dry Goods Co. v. Hudson (C. C. A. 8th

Goods Co. v. Hudson (C. C. A. 8th Cir.), 122 Fed. Rep. 232, 10 Am. B. R. 225; *In re* Rhutassel, 96 Fed. interpretation of the law does not require a close examination into the form of the action to determine whether technically it is ex delicto or otherwise, but the real question is, was the relief granted in the judgment based upon actual as distinguished from constructive fraud of the bankrupt? If the judgment is thus founded, whatever the form of the action, it is the intent and purpose of the law that the bankrupt shall not be discharged from it, but shall still rest under its obligation, so far as the bankrupt law is concerned." 1

The words "judgments in actions for frauds" were omitted in the amendment of February 5, 1903.<sup>2</sup> In proceedings begun since that time judgments in that class of actions are released by a discharge to the same extent as if the claim had not been reduced to a judgment.

As clause 2 of Section 17 stands since the amendment of February, 5, 1903,<sup>3</sup> "liabilities for obtaining property by false pretenses or false representations" are not discharged.<sup>4</sup> The word "liabilities" was substituted for "judgments" by the amendment. Prior to that time it was necessary to reduce a debt arising from obtaining property by false pretenses or false representations to a judgment prior to bankruptcy to prevent its being discharged.<sup>5</sup> All such debts and claims against the estate of the bankrupt, whether reduced to judgment or not, are now preserved against the bankrupt notwithstanding his discharge.

To fall within this provision the debt must be fraudulent. The essential character of the fraud is the same as under

Rep. 597, 2 Am. B. R. 697; Morse & Rogers v. Kaufman, 100 Va. 218, 7 Am. B. R. 549; Bullis v. O'Beirne, 195 U. S. 606, 49 L. Ed. 340, 13 Am. B. R. 108; Goodman v. Herrman, 172 Mo. 344.

<sup>&</sup>lt;sup>1</sup> Bullis v. O'Beirne, 195 U. S. 606, 620, 49 L. Ed. 340, 13 Am. B. R. 108. See Matter of Benoit, 20 Am. B. R. 270.

<sup>&</sup>lt;sup>2</sup> 32 Stat. at L. 797.

<sup>3 32</sup> Stat. at L. 797.

<sup>&</sup>lt;sup>4</sup> Mackel v. Rochester, 135 Fed. Rep. 904, 14 Am. B. R. 429.

<sup>&</sup>lt;sup>5</sup> Mackel v. Rochester, 135 Fed. Rep. 904, 14 Am. B. R. 429; *In re* Cole, 106 Fed. Rep. 807, 5 Am. B. R. 780.

the former statutes, which was held to mean positive fraud or fraud in fact involving moral turpitude or intentional wrong and not implied fraud, which may exist without any imputation of bad faith.<sup>6</sup>

Obtaining the services of an attorney by false pretenses is not obtaining "property" within the statute where the amount of fees to be paid was at no time agreed upon, as property implies dominion, and a right of user or of disposition over a man and his services which is not present in the relation of attorney and client.<sup>10</sup>

The fraud or false representation must be clearly set up in the declaration as the gist of the action.<sup>11</sup>

## § 761. "Liabilities" include judgments.

Since the amendment of 1903 it is immaterial whether or not the claim is in the form of a judgment, as the word

6 Bullis v. O'Beirne, 195 U. S. 606, 49 L. Ed. 340, 13 Am. B. R. 108; Forsyth v. Vehmeyer, 177 U. S. 177, 44 L. Ed. 723, and cases collected in the opinion; *In re* Adler (C. C. A. 2d. Cir.), 144 Fed. Rep. 659, 16 Am. B. R. 414; Western Union Cold Storage Co. v. Hurd, 116 Fed. Rep. 442, 8 Am. B. R. 633; Lee v. Tarplin, 194 Mass. 47, 79 N. E. 786; Shepard v. Morgan, 123 N. Y. App. Div. 128, 108 N. Y. Suppl. 379; Nichols v. Doak, 48 Wash. 457, 93 P. 919, goods obtained by fraud.

The discharge is not a bar to an action for fraudulent representations to induce plaintiff to sell machines. Standard Sewing Machine Co. v. Kattell, 132 N. Y. App. Div. 539, 117 N. Y. Suppl. 32. No fraudulent representations where the creditors knew the facts under which the agreement was made in Hoskins v. Velasco National Bank, 48 Tex. Civ. App. 246, 107 S. W. 598.

Action for fraudulently obtaining goods begun after petition for discharge filed and before discharge granted is not affected by the discharge, although the bankrupt claimed that he should be judged by the condition of things when his petition for discharge was filed. Standard Sewing Machine Co. v. Alexander, 68 S. C. 506, 47 S. E. 711.

10 In re Thaw, 180 Fed. Rep. 419.
 See Gleason v. O'Mara (C. C. A. 3d Cir.), 180 Fed. Rep. 417, 103 C.
 C. A. 563, 24 Am. B. R. 832.

<sup>11</sup> Where plaintiff sues on a contract and defendant sets up his discharge in bankruptcy and the plaintiff replies that the note sued on was a liability for obtaining property by false pretenses this was held improper as inconsistent with the claim sued upon. Strauch v. Flynn, 108 Minn. 313, 122 N. W. 320.

"judgments" has been omitted and "liabilities" substituted. If it is a liability for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of a wife or child, or for seduction of an unmarried female or for criminal conversation, it is not discharged.<sup>12</sup>

## § 762. Misrepresentations as to credit. 15

In this class of debts the fraud usually consists in misstatements of the buyer as to his ability to pay or means of payment, such as false statements as to what property he owns, what debt he owes, what kind of business he is doing, that his property is unencumbered and the like. Where the vendee purchases with a positive intention not to pay for the goods a debt is created which is not discharged.

A fraudulent representation which would justify the rescission of a contract of sale is sufficient to prevent a discharge of the debt upon the affirmance of the sale. Cases relating to fraudulent sales are instructive in construing this provision. In order to bring a debt within the exception it must be shown that the bankrupt made the representations knowing them to be false and they must have induced the seller to consummate the sale when he otherwise would

<sup>12</sup> B. A. 1898, Sec. 17, as amended Feb. 5, 1903, 32 Stat. at L. 797.

The character of the "liability" as that word is used in Sec. 17 (2) is not changed by the fact that the liability was reduced to judgment. Peters v. United States (C. C. A. 7th Cir.), 177 Fed. Rep. 885, 101 C. C. A. 99, 24 Am. B. R. 206.

A liability for malicious injury includes a judgment for such injury, although the amendment of 1903 changed the word "judgment" to "liabilities." The court notices the claim that when a judgment has been obtained the liability is

merged therein and the claim no longer adheres to the liability, but is transferred into a new species of right; but the court says that Congress in making this amendment was looking to the substantial nature of the liability; and the court finds that a judgment on such a cause of action is, in plain English, a "liability" therefor. Thompson v. Judy (C. C. A. 6th Cir.), 169 Fed. Rep. 553, 95 C. C. A. 51, 22 Am. B. R. 154.

<sup>15</sup> Compare false statements for obtaining credit as ground for opposing discharge, *ante*, Sec. 730.

not have done so.<sup>16</sup> It is not necessary that the false representations should be the sole and exclusive consideration for the credit, but only that they were a material consideration, without which, in all probability, the credit would not have been given.<sup>17</sup> The seller must have relied upon the statements of the buyer as an inducement to make the sale.<sup>18</sup> A promise to pay cash, when the goods are delivered and failure to do so, is not a fraudulent representation.<sup>19</sup>

It is not necessary that the false representations be in writing.<sup>20</sup> Section 14b(3) is not to be interpolated into Section 17a(2) as that would result in the absurdity that deceivers, despite their discharges, should remain liable for oral deceits although excused from written deceits.<sup>21</sup>

The mere omission of a purchaser of goods to disclose his insolvency to the vendor is not regarded as fraudulent in itself.<sup>22</sup> There is a distinction between withholding information and making false statements with reference to one's financial condition.

Where a bankrupt vendee obtains property from a bankrupt vendor with the intent to hinder, delay and defraud the creditors of the vendor, well knowing that he was insolvent and contemplated bankruptcy, the property was obtained by false pretenses and a debt for the value of the property exists in favor of the trustee of the vendor against the estate of the vendee which is not released by the discharge of the vendee.<sup>23</sup>

16 In re Patterson & Co., 125 Fed.
Rep. 562, 10 Am. B. R. 748; In re Gany, 103 Fed. Rep. 930, 4 Am. B.
R. 576; In re Roalswick, 110 Fed.
Rep. 639, 6 Am. B. R. 572; In re O'Conner, 114 Fed. Rep. 777, 7
Am. B. R. 428; Bloomingdale v. Empire Rubber Co., 114 Fed. Rep. 1016, 8 Am. B. R. 74.

<sup>17</sup> In re Gany, 103 Fed. Rep. 930,
 4 Am. B. R. 576.

<sup>18</sup> In re Epstein, 109 Fed. Rep. 878. 6 Am. B. R. 60; In re Davis,

112 Fed. Rep. 294, 7 Am. B. R. 276.
19 In re Lewis, 125 Fed. Rep. 143,
10 Am. B. R. 741.

<sup>20</sup> Katzenstein v. Reid, Murdock
 & Co. (Texas 1905), 91 S. W. 360,
 363, 16 Am. B. R. 740.

<sup>21</sup> Talcott v. Friend (C. C. A. 7th Cir.), 179 Fed. Rep. 676, 103 C. C. A. 80, 24 Am. B. R. 708.

<sup>22</sup> In re Davis, 112 Fed. Rep. 294,
 7 Am. B. R. 276.

<sup>28</sup> Mackel v. Rochester, 135 Fed. Rep. 904, 14 Am. B. R. 429. A false representation to a mercantile agency avoids the discharge when relied on by the creditor,<sup>24</sup> but the discharge is no bar where an action for fraud is compromised and a judgment entered on a stipulation after the granting of the discharge.<sup>25</sup>

A false representation by one partner by which property was obtained by the partnership will in law be imputed to the other partners to the extent of holding them civilly liable for the debt.<sup>26</sup>

## § 763. Willful and malicious injuries.

A discharge in bankruptcy does not release judgments in actions for willful and malicious injuries to persons or property of another.<sup>27</sup>

The effect of this provision is not to except all judgments for torts from the effect of the discharge. In order that a judgment shall not be released, the injury to the person or property must have been willful and malicious. The supreme court has recently handed down an opinion containing the following discussion: "In United States v. Reed (C. C.), 86 Fed. Rep. 308, it was held that malice consisted in the willful doing of an act which the person doing it knows is liable to injure another regardless of the consequences; and a malignant spirit or a specific intention to hurt a particular person is not an essential element. Upon that principle we think a willful disregard of what one knows to be his duty, an act which is against good morals and wrongful in and of itself, and which necessarily causes injury and is done intentionally, may be said to be done willfully and maliciously, so as to come within the exception. It is urged that

Katzenstein v. Reid, 16 Am. B.
 R. 740; Cf. In re Augspurger, 181
 Fed. Rep. 174, 25 Am. B. R. 83.

<sup>&</sup>lt;sup>25</sup> Stevens v. Meyers, 8 Am. B. R. 496.

<sup>&</sup>lt;sup>26</sup> Frank v. Michigan Paper Co. (C. C. A. 4th Cir.), 179 Fed. Rep. 776, 103 C. C. A. 268, 24 Am. B. R. 261.

<sup>&</sup>lt;sup>27</sup> B. A. 1898, Sec. 17, clause 2,

the malice referred to in the exception is malice towards the individual personally, such as is meant, for instance, in a statute for maliciously injuring or destroying property or for malicious mischief, where mere intentional injury, without special malice toward the individual, has been held by some courts not to be sufficient. Commonwealth v. Williams, 110 Mass. 401. We are not inclined to place such a narrow construction upon the language of the exception. We do not think the language used was intended to limit the exception in any such way. It was an honest debtor, and not a malicious wrongdoer, that was to be discharged.<sup>28</sup>

The change in the wording in the amendment of 1903 from "judgments" to "liabilities" did not change the rule for a liability for malicious injuries includes a judgment on such liability.<sup>29</sup>

Whether the act was willful and malicious must be determined by the record of the court in which the judgment was recovered. It is a question of law for the court, and should not be submitted to a jury.<sup>30</sup>

## § 764. Alienation of affections.

Alienation of affections may be a willful and malicious injury.<sup>32</sup>

<sup>28</sup> Peckham, J., in Tinker v. Colwell, 193 Ú. S. 473, 48 L. Ed. 754.
<sup>29</sup> Thompson v. Judy (C. C. A. 6th Cir.), 169 Fed. Rep. 553, 95 C.
C. A. 51, 22 Am. B. R. 154; Peters v. United States (C. C. A. 7th Cir.), 177 Fed. Rep. 885, 101 C. C. A. 99, 24 Am. B. R. 206; Woehrle v. Canclini (Cal. 1910), 109 Pac. 888. See Stefanini v. Sroka, 43 Misc. (N. Y.) 614, 88 N. Y. Suppl. 167.

30 See Flanagan v. Pearson, 42 Tex. 1; Peters v. United States (C. C. A. 7th Cir.), 177 Fed. Rep. 885, 101 C. C. A. 99, 24 Am. B. R. 206; Donald v. Kell, 111 Ind. 1, 11 N. E. 782.

In an action against a surgeon for injuries sustained in an operation. the certificate found the injuries to have been "willful and malicious," and the claim was held not barred by the discharge. Flanders v. Mullin, 80 Vt. 124, 66 A. 789, 18 Am. B. R. 708.

<sup>32</sup> Leicester v. Hoadley, 66 Kas. 172, 9 Am. B. R. 318; Exline v. Sargent, 23 Ohio Cir. 180.

## § 765. Assault and battery.

A liability for assault and battery survives the discharge,<sup>33</sup> unless the injuries committed are not shown to be willful or malicious.<sup>34</sup>

#### § 766. Conversion.

An ordinary liability in trover for conversion is barred by the discharge,<sup>35</sup> but may not be barred when based on malice <sup>37</sup> or fraud.<sup>39</sup>

#### § 767. False imprisonment.

A liability for false imprisonment is not barred by the discharge.<sup>41</sup>

<sup>33</sup> McChristal v. Clisbee, 190
 Mass. 120, 3 L. R. A., N. S. 702,
 16 Am. B. R. 838.

<sup>34</sup> United States, ex rel. Kelley v. Peters, 166 Fed. Rep. 613, 22 Am. B. R. 177 (school-teacher whipping pupil).

38 Crawford v. Burke, 195 U. S. 176, 49 L. Ed. 147, where an action of contract might have been brought. In re Floyd & Crawford & Co., 15 Am. B. R. 277 (referee); Fletcher v. Postel, 114 N. Y. App. Div. 776, 100 N. Y. Suppl. 207, 17 Am. B. R. 316, when founded on contract.

"Injury to person and property means causing damage to the subject-matter of the rights, not depriving the owner of them." In re Ennis & Stoppani, 171 Fed. Rep. 755, 22 Am. B. R. 679.

<sup>87</sup> A judgment in an action of trover for a cause of action arising from the "willful and malicious act or neglect" of the bankrupt falls short of showing that the property converted was obtained by false pretenses within Sec. 17a (2). Ex parte Peterson, 77 Vt. 226, 59 A. 828.

Malice does not necessarily include ill-will, but it is enough to show a willful disregard of what one knows to be his duty and which necessarily causes injury and is, done intentionally, wilfully and maliciously. So a conversion of property may be committed in good faith, but rests on a different basis where it shows a reckless disregard of the rights of another. Kavanaugh v. McIntyre, 128 N. Y. App. Div. 722, 112 N. Y. Suppl. 987, 21 Am. B. R. 327.

<sup>39</sup> Kavanaugh v. McIntyre, 128 N. Y. App. Div. 722, 112 N. Y. Suppl. 987, 21 Am. B. R. 527, broker's sale of stock without knowledge of customer.

An ordinary action of trover at common law for wrongful conversion, which action did not necessarily depend on fraud, is barred by the discharge, although the declaration in the common law fictional form alleges fraud. Burnham v. Pidcock, 33 Misc. (N. Y.), 65, 66 N. Y. Suppl. 680, affirmed, 58 N. Y. App. Div. 273, 68 N. Y. Suppl. 1007.

<sup>41</sup>McChristal v. Clisbee, 190 Mass. 120, 3 L. R. A., N. S. 702, 16 Am. B. R. 838.

#### § 768. Libel or slander.

A liability for libel <sup>48</sup> or slander is preserved against the discharge as it is for a willful, malicious injury. <sup>46</sup>

#### § 769. Malicious prosecution.

A liability for malicious prosecution is not barred by the discharge.<sup>47</sup>

# § 770. Negligence.

A judgment founded upon negligence without malice is released by the discharge.<sup>48</sup> An action for causing the death of the plaintiff's husband by an overdose of chloral, intended for his own good, is not a malicious injury to the plaintiff's property.<sup>49</sup>

## § 771. Alimony and support of wife or child.

The amendment of 1903 enumerates liabilities for injury not released by discharge, which were held by the courts

An action for false imprisonment is not barred by the discharge although the imprisonment was not malicious and malice in fact is not alleged. "Willful and malicious injuries" in the bankruptcy act include any intentional injury to another. Johnston v. Bruckheimer, 133 N. Y. App. Div. 649 (reversing 116 N. Y. Suppl. 688).

<sup>48</sup> National Surety Co. v. Medlock, 2 Ga. App. 665, 58 S. E. 1131, 19 Am. B. R. 654. A judgment for libel is for willful and malicious injuries as "one of the essential elements of every libel is malice." McDonald v. Brown, 23 R. I. 546, 51 A. 213, — L. R. A. 768, 91 Am. St. Rep. 659, 10 Am. B. R. 58.

"Willful or malicious injuries to the person or property of another" includes a libel and is not confined to a physical injury to the person and extends to those inherent rights of the person which stand in the same class as his right to security from a violence done to his body. Thompson v. Judy (C. C. A. 6th Cir.), 169 Fed. Rep. 553, 95 C. C. A. 51, 22 Am. B. R. 154. 40 Sanderson v. Hunt, 116 Ky. 435, 25 Ky. L. Rep. 626, 76 S. W. 179.

<sup>47</sup> McChristal v. Clisbee, 190 Mass.
120, 3 L. R. A. N. S. 702, 16 Am.
B. R. 838; Mason v. Perkins, 180
Mo. 702, 79 S. W. 683, 103 Am. St.
Rep. 591, judgment.

<sup>48</sup> In re Lorde, 144 Fed. 320, 16 Am. B. R. 201. Landlord held released from judgment for bite by a dog of his tenant.

<sup>49</sup> Tompkins v. Williams, 122 N. Y. Suppl. 152.

to be included in the original act as the cases cited above in this section show. They are liabilities for "alimony due or to become due, for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation." This has been interpreted by the supreme court as "merely declaratory of the true meaning and sense of the statute." <sup>50</sup>

Judgments directing the payment of certain sums periodically, for the support of a bastard or other child,<sup>51</sup> or judgments directing the payment of alimony are not discharged.<sup>54</sup>

Alimony includes money covered by an agreement in the nature of alimony to pay an annual sum to the wife,<sup>55</sup> but

50 Wetmore v. Markoe, 196 U. S.68, 77, 49 L. Ed. 390, 13 Am. B.R. 1.

51 Dunbar v. Dunbar, 190 U. S.
340, 47 L. Ed. 1084, 10 Am. B.
R. 139; In re Hubbard, 98 Fed.
Rep. 710, 3 Am. B. R. 528; In re
Baker, 96 Fed. Rep. 954, 3 Am.
B. R. 101; In re Cotton, No. 3269
Fed. Cas., 2 N. Y. Leg. Obs. 370;
Comm. v. Erisman, 21 Pitts. L.
Jour. 69.

An order for the support of a minor child is not alimony, and is not barred by the discharge, although the obligation to reimburse another who has supported his children is discharged. Rush v. Flood, 105 Ill. App. 182. Under the act of 1898 where an order in a bastardy case is merged in a final money judgment for support in instalments this is extinguished by the discharge. McKittrick v. Cahoon, 89 Minn. 383, 95 N. W. 223, 62 L. R. A. 757, 99 Am. St. Rep. 606.

54 Audubon v. Shufeldt, 181 U. S.
 575, 45 L. Ed. 1009, 5 Am. B. R.
 829; Wetmore v. Markoe, 196 U. S.
 68, 49 L. Ed. 390, 13 Am. B. R.

1; Dunbar v. Dunbar, 190 U. S. 340. 57 L. Ed. 1084, 10 Am. B. R. 139; Barkley v. Barkley, 184 Ill. 375; Turner v. Turner, 108 Fed. Rep. 785, 6 Am. B. R. 289; In re Shepard, 97 Fed. Rep. 187, 5 Am. B. R. 857; In re Nowell, 99 Fed. Rep. 931, 3 Am. B. R. 837, future alimony; Young v. Young, 7 Am. B. R. 171; Craine v. Craine (Ky. 1907), 19 Am. B. R. 76; Dean v. Bloomer, 191 Ill. 416; Welty v. Welty (Ill.), 63 N. E. 161; Maisner v. Maisner, 6 Am. B. R. 295. (Alimony in arrears at the filing of the petition.) In re Emil J. Smith, 3 Am. B. R. 67 (referee).

Alimony was held provable and dischargeable in *In re* John M. Van Orden, 96 Fed. Rep. 86, 2 Am. B. R. 801; *In re* Challoner, 98 Fed. Rep. 82, 3 Am. B. R. 442; Fite v. Fite, 5 Am. B. R. 461. A valuable discussion by Referee Hotchkiss of the status of alimony may be found in *In re* Emil J. Smith, 3 Am. B. R. 67.

Schlessinger v. Schlessinger, 39
 Colo. 44, 88 P. 970, 972; Dunbar v. Dunbar, 180 Mass. 170, 62 N. E. 248, 94 Am. St. Rep. 623, affirmed, 190

does not include a liability for goods voluntarily purchased by the husband and parent and used by the wife and child.<sup>56</sup> A debt for medical attendance to the wife or child of the bankrupt, at his request, while the recipient is a member of his family, is not a debt "for maintenance or support of wife or child," which is excepted from the effect of a discharge.<sup>57</sup>

#### § 772. Seduction—Breach of promise to marry.

An action for breach of promise to marry sounds in contract and is barred by the discharge,<sup>1</sup> whether seduction is also proved <sup>2</sup> or not.<sup>3</sup>

Seduction of an unmarried female was by the amendment of 1903 expressly excepted from a discharge,<sup>4</sup> although the courts had reached the same result under the act of 1898,<sup>5</sup> and seduction itsef has been held to be a willful and malicious injury both to the female <sup>6</sup> and to the father.<sup>7</sup>

#### § 773. Criminal conversation.

A liability for criminal conversation is by the amendment of 1903 expressly excepted from the discharge,8 although the

U. S. 340, 47 L. Ed. 1084, 10 Am. B. R. 139.

<sup>56</sup> Schellenberg v. Mullaney, 112 N. Y. App. Div. 384, 98 N. Y. Suppl. 432, 16 Am. B. R. 542.

<sup>57</sup> In re Ostrander, 139 Fed. Rep. 592, 15 Am. B. R. 96.

<sup>1</sup> See *In re* Sidle, No. 12844 Fed. Cas., 2 N. B. R. 220; Aling v. Egan, 11 Rob. (La.) 244.

Disler v. McCauley, 66 N. Y.
App. Div. 42, 73 N. Y. Suppl. 270,
7 Am. B. R. 138; Biela v. Urbanczyk (Texas 1905), 85 S. W. 451.

<sup>3</sup> Bond v. Milliken, 134 Iowa, 447, 109 N. W. 774, 17 Am. B. R. 811; Finnegan v. Hall, 35 Misc. (N. Y.) 773.

<sup>4</sup> B. A. 1898, Section 17a (3) as amended February 5, 1903.

<sup>6</sup> In re Cotton, No. 3269 Fed. Cas., 2 N. Y. Leg. Obs. 370; Nassau v. Parker, 2 Penn. L. Jour. 298. Such cases are put on the ground of not being judgments for willful and malicious injury. In re Freche, 109 Fed. Rep. 620, 6 Am. B. R. 479; In re Maples, 105 Fed. Rep. 919, 5 Am. B. R. 426; Distler v. McCauley, 35 Misc. (N. Y.) 411, 6 Am. B. R. 491.

<sup>6</sup> In re Maples, 105 Fed. Rep. 919, 5 Am. B. R. 426.

<sup>7</sup> In re Freche, 109 Fed. Rep. 620, 6 Am. B. R. 479.

<sup>8</sup> B. A. 1898, Section 17a (3) as amended by the statute of 1903.

same result was reached in a case arising before the amendment on the ground that an act of adultery with the wife, was a malicious and willful injury to the husband's rights and property.9

## § 774. Debts not scheduled—Actual knowledge.

A discharge will not release a bankrupt from debts which have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy, 10 and although the claim was in fact unknown to the bankrupt himself. 13 Where the court has jurisdiction and the claims have been placed upon the schedule, or if omitted from it and the creditors have had

Tinker v. Colwell, 193 U. S. 473,
L. Ed. 754, 11 Am. B. R. 568,
affirming Colwell v. Tinker, 169 N.
St. 531, 58 L. R. A. 765, 98 Am. St.
Rep. 587, 62 N. E. 668.

<sup>10</sup> B. A. 1898, Sec. 17, clause 3; Birkett v. Columbia Bank, 195 U. S. 345, 49 L. Ed. 231, 12 Am. B. R. 691; In re Monroe, 114 Fed. Rep. 398, 7 Am. B. R. 706; Tyrrel v. Hammerstein, 67 N. Y. Supp. 717, 6 Am. B. R. 430; see also Knapp v. Harold, 1 C. C. New Series, Ohio, 469; Murphy v. Blumenrich, 19 Am. B. R. 910; Collins v. McWalters, 6 Am. B. R. 593; Woodward v. Shaefer, 91 N. Y. Suppl. 104; In re Boom, 48 Misc. (N. Y.) 632, 96 N. Y. Suppl. 204, where reasonable effort lacking; Haack v. Theise, 51 Misc. (N. Y.) 3, 99 N. Y. Suppl. 905; Fields v. Rust, 36 Tex. Civ. App. 350, 82 S. W. 331.

Where judgment against a stockholder on his statutory liability for a labor claim was issued July 3, 1899, and the defendant was adjudged a bankrupt May 17, 1899, and discharged July 12, 1899, the debt is not barred where not scheduled and knowledge did not appear. Wineman v. Fisher, 135 Mich. 604, 98 N. W. 404, 10 Detroit Leg. N. The difference between "notice" and "actual knowledge" is discussed and the court holds that it immaterial how the "actual knowledge" is obtained, as it is enough however obtained in Jones v. Walter, 115 Ky. 556, 74 S. W. 249, 24 Ky. L. Rep. 2459.

<sup>13</sup> Santa Rosa Bank v. White, 139 Cal. 703, 73 P. 577.

notice or actual knowledge of the proceedings,<sup>14</sup> the debt if provable,<sup>15</sup> is released by the discharge.<sup>16</sup> Notice to an agent is sufficient.<sup>17</sup>

A note is barred by the discharge, although the middle initial of the bankrupt in the bankruptcy proceedings is different from that given in the note itself, where the creditor was properly scheduled and received notice of the proceedings. The court holds that the creditor had notice of the identity of the obligation.<sup>21</sup>

Evidence of what the schedules contain must be given by the records themselves and not by verbal evidence of an examination of the schedules.<sup>22</sup>

14 Alling v. Straka, 118 III. App.
184; Zimmerman v. Ketchum, 66
Kan. 98, 71 P. 264; Dycus v. Brown,
(Ky. 1909), 121 S. W. 1010; Armstrong v. Sweeney, 73 Neb. 775, 103
N. W. 436; Morrison v. Vaughan,
18 Am. B. R. 704, 119 N. Y. App.
Div. 184; Cohen v. Pinkus, 20 Am.
B. R. 787.

<sup>15</sup> A debt not provable is not barred by the discharge, whether scheduled or not. Smith v. Mc-Quillin, 193 Mass. 289, 79 N. E. 401. Only provable debts are discharged, see Sec. 727.

<sup>16</sup> Zimmerman v. Ketchum, 66
Kan. 98, 11 Am. B. R. 190; Claster v.
Soble, 22 Pa. Sup. Ct. 631, 10 Am.
B. R. 446; Knapp v. Harold, 1 Ohio
C. C. Rep. (N. S.) 469, 25 Ohio
C. C. Rep. 213.

<sup>17</sup> Longfield v. Minnesota Savings Bank, 95 Minn. 54, 14 Am. B. R. 413; Atkinson v. Elmore, 103 Mo. App. 403, 77 S. W. 492, manager of bank collecting notes.

A claim was properly scheduled as residence unknown care of creditor's attorney where creditor was unknown and non-resident and attorneys directed letters sent to them. In re David, 44 Misc. (N. Y.) 516, 90 N. Y. Suppl. 85.

The knowledge of bankruptcy proceedings acquired by one as cashier of one creditor is imputed to other creditors, whom he represented as receiver of another corporation. The cashier owed a duty as receiver to disclose the information he had and he will be assumed to have performed it. Dight v. Chapman, 44 Ore. 265, 75 P. 585, 65 L. R. A. 793.

Notice to an attorney who was suing the bankrupt in the state courts is not notice to the client, as the attorney had no authority to represent him in the bankruptcy proceedings. The bankruptcy act requires personal notice or actual knowledge as distinguished from mere imputed or constructive notice or knowledge. Strickland v. Capital City Mills, 74 S. C. 16, 7 L. R. A., N. S. 426, 54 S. E. 220.

<sup>21</sup> Northern Commercial Co. v. Hartke (Minn. 1910), 125 N. W. 508.

<sup>22</sup> Thomson v. Caverley, 148 III. App. 295. Where the debt is not scheduled "actual knowledge of the proceedings contemplated by the section is a knowledge in time to avail the creditor of the benefits of the law—in time to give him an equal opportunity with other creditors—not a knowledge that may come so late as to deprive him of participation in the administration of the affairs of the estate or to deprive him of dividends." <sup>28</sup>

## § 775. Name of the creditor.

The act provides that the schedule shall show the name of the creditor if known to the bankrupt.<sup>25</sup> The debt is not barred where the name is misstated,<sup>26</sup> unless the creditor had actual knowledge of the bankruptcy,<sup>28</sup> although a slight error may be immaterial,<sup>29</sup> or a business name may be used.<sup>31</sup>

Where a bankrupt inserts in his schedules an incorrect name or residence of a creditor, upon a suit for the debt,

<sup>23</sup> Birkett v. Columbia Bank, 195 U. S. 345, 49 L. Ed. 231, 12 Am. B. R. 691; Knapp v. Harold, 25 Ohio Cir. Ct. 213, before or after the filing of the petition.

Actual knowledge in time to participate in all proceedings except the choice of a trustee is sufficient, although the debt was not scheduled. Morrison v. Vaughan, 119 N. Y. App. Div. 184, 104 N. Y. Suppl. 169.

<sup>25</sup> B. A. 1898, Sec. 17a (3).

<sup>26</sup> Beck & Gregg Hardware Co. v. Crum, 127 Ga. 94, 56 S. E. 242; Marshall v. English American Loan & Trust Co., 127 Ga. 376, 56 S. E. 449; Reed v. Dippel, 17 Am. B. R. 371, though the creditor's ignorance was due to his own neglect. Liesum v. Kraus, 35 Misc. (N. Y.) 376, 71 N. Y. Suppl. 1022 ("Liesman" for "Liesum"); Custard v. Wigderson, 130 Wis. 412, 110 N. W. 263 ("Castard" for "Custard").

It is not a proper schedule to name a creditor the "Dalton & Bell Co.," where its real name is "Wright-Dalton-Bell-Anchor Store Company." Wright-Dalton-Bell-Anchor Store Co. v. Sanders, 142 Mo. App. 50, 125 S. W. 517.

<sup>28</sup> Fider v. Mannheim, 81 N. W. 2<sup>e</sup>
 (Minn.).

<sup>29</sup> Grosso v. Marx, 45 Misc.
 (N. Y.) 500, 92 N. Y. Suppl. 773
 (Ringler" for "Ringle").

Name in schedule "Green Gatliff" covers "Green A. Gatliff."
"Tucker Evans" in schedule the same as "A. C. Evans." Gatliff v. Mackey, 31 Ky. L. Rep. 947, 104 S. W. 379.

<sup>81</sup> Lutz v. Kalmus, 115 N. Y. Suppl. 230 (John Lutz & Son, the business name, where Charles I. Lutz was the sole surviving partner).

such creditor may show that he never had actual knowledge of the bankruptcy proceedings.<sup>32</sup>

The real, rather than the nominal, creditors may be scheduled.<sup>33</sup>

The owner of the claim at the date of the petition should be inserted in the schedule,<sup>35</sup> if known to the bankrupt,<sup>36</sup> although, of course, if that person had actual knowledge he is barred by the discharge, though not named in the schedule.<sup>37</sup>

#### § 776. Residence of creditor.

The residence of the creditor is not required by the act itself, but is prescribed by official Form No. 1 drawn in

<sup>32</sup> Westheimer v. Howard, 93 N. Y. Supp. 518, 14 Am. B. R. 547. See also Sutherland v. Lasher, 84 N. Y. Supp. 56, 11 Am. B. R. 780; Schiller v. Weinstein, 91 N. Y. Supp. 76, 15 Am. B. R. 183.

<sup>38</sup> A note is properly scheduled as owing to a bank, the real owner of it, though the nominal holder of the note was its cashier. Ross-Lewin v. Goold, 211 Ill. 384, 71 N. E. 1028, affirming 113 Ill. App. 499.

A stockholder may properly schedule as liabilities the various creditors of the corporation, though a receiver has been appointed for the corporation who has taken title. Longfield v. Minnesota Savings Bank, 95 Minn. 54, 103 N. W. 706.

<sup>85</sup> Kaufman v. Schreier, 108 N. Y. App. Div. 298, 95 N. Y. Suppl. 729, 17 Am. B. R. 314, surviving partner proper. See Loomis v. Wallblom, 94 Minn. 392, 13 Am. B. R. 687 (original debtor rather than assignee properly named).

<sup>36</sup> Scheduling a mortgage in the name of the original mortgagee is sufficient, though an assignment was duly recorded where the bankrupt had no knowledge of the assignment. Mueller v. Garlitz, 53 Misc. (N. Y.) 53, 103 N. Y. Suppl. 1037, 17 Am. B. R. 687.

Where the petition schedules the judgment creditor by name, but in ignorance of the fact that he had died within four months, although no probate was granted within five years thereafter, the notice is adequate and the judgment should be cancelled. Lent v. Farnsworth, 180 N. Y. 506, 72 N. E. 1144, affirmed, 15 N. Y. Anno. Cas. 114, 94 N. Y. App. Div. 99, 87 N. Y. Suppl. 1112.

37 The holders of notes scheduled in the names of the original payees were thus barred. Fider v. Mannheim, 78 Minn. 309, 81 N. W. 2; Broadway Trust Co. v. Mannheim, 47 Misc. (N. Y.) 415, 95 N. Y. Suppl. 93, 34 Civ. Proc. R. 310.

pursuance of the authority given by Section 30 of the act.<sup>39</sup> Unless actual notice was had,<sup>40</sup> the creditor is not barred where the residence is not correctly and fully stated,<sup>41</sup> with the street and number,<sup>44</sup> unless unknown to the bankrupt.<sup>45</sup>

The bankrupt may designate the residence as unknown only where it can not be ascertained by reasonable diligence.<sup>48</sup>

<sup>30</sup> See, however, remarks in Steele v. Thalheimer, 74 Ark. 516, 86 S. W. 305, to the effect that the act does not require the address to be scheduled.

<sup>40</sup> Where actual notice was given, the fact that an address was erroneously given, as directed by the creditor's attorneys, will not prevent a cancellation of the judgment. Vaughn v. Irwin, 49 Misc. (N. Y.) 611, 96 N. Y. Suppl. 742.

<sup>41</sup> Marshall v. English-American Loan & Trust Co., 127 Ga. 376, 56 S. E. 449; *In re* Quackenbush, 122 N. Y. App. Div. 456, 106 N. Y. Suppl. 773; Reed v. Dippel, 17 Am. B. R. 371; Haack v. Theise, 51 Misc. (N. Y.) 3, 99 N. Y. Suppl. 905, ditto marks insufficient.

Debt not properly scheduled where fictitious address given and real address appeared in directory. Murphy v. Blumenreich, 123 N. Y. App. Div. 645, 108 N. Y. Suppl. 175.

Where correct street and street number but wrong city and state, the creditor is not barred in the absence of evidence that the notice actually reached him. Westheimer v. Howard, 47 Misc. (N. Y.) 145, 93 N. Y. Suppl. 518.

44 The address "Mulberry Street, New York City," in a schedule is insufficient where the street number has regularly appeared in the city directories for many years as 15 Mulberry Street, and where the creditor swears positively he never received the notice. Cogliostro v. Indelli, 53 Misc. (N. Y.) 44, 102 N. Y. Suppl. 918, 17 Am. B. R. 685.

45 The mere fact that bankrupt knew the creditor's address three years before bankruptcy does not show fraud in listing his address in the schedule as unknown. *In re* Moliner, 75 N. Y. App. Div. 44, 78 N. Y. Suppl. 281,

Although a creditor's address incorrectly stated so he had no notice of the proceedings, still he is bound by the discharge where it was not alleged or shown that the bankrupt knew the correct address or that the failure to give it was intentional or fraudulent. The court remarks that failure to give the correct address does not make the discharge of no effect under the act as the debt was scheduled with the name of the creditor as required: Steele v. Thalheimer, 74 Ark. 516, 86 S. W. 305.

Where the residence of a creditor was unknown to the debtor, and he inserts an incorrect one in his schedule, his motion after his discharge to set aside the judgment will be denied. Sutherland v. Lasher, 41 Misc. (N. Y.) 249, 84 N. Y. Suppl. 56.

48 Schiller v. Weinstein, 47 Misc. (N. Y.) 622, 94 N. Y. Suppl. 763. Where it appears that the debtor

Where it appears that the debtor knew the address of the creditor's

The residence of the creditor for this purpose is not his office <sup>50</sup> or that of his attorney or representative. <sup>52</sup>

#### § 777. Statement of indebtedness.

Where the name of the creditor is correctly inserted in the petition and it appears he had notice of the proceedings he will be barred, although the indebtedness itself was incorrectly stated, <sup>54</sup> or a portion of it was omitted altogether, <sup>56</sup> but the discharge is no bar in the absence of actual knowledge, where the claim is described as a mortgage and bond given by another as it does not show that it is a debt of the bankrupt. <sup>57</sup>

#### § 778. Abbreviations.

Abbreviations in the schedule are expressly forbidden in General Orders  $V.^{58}$ 

attorney and made 'no effort to ascertain the creditor's address and no notice was sent to the creditor or his attorney, the debt is not properly scheduled. Feldmark v. Weinstein, 45 Misc. (N. Y.) 329, 90 N. Y. Suppl. 478.

<sup>50</sup> Weidenfeld v. Tillinghast, 104 N. Y. Suppl, 902, 18 Am. B. R. 531, affirming 54 Misc. (N. Y.) 90, 104 N. Y. Suppl, 712.

Where residence is given at office, this is sufficient where the notice actually reaches the creditor. Grosso v. Marx, 45 Misc. (N. Y.) 500, 92 N. Y. Suppl. 773.

<sup>52</sup> Care New York Clipper, N. Y. C., is not a statement of plaintiff's residence. Haack v. Thiese, 51 Misc. (N. Y.) 3, 99 N. Y. Suppl. 905.

Where address could not be found in city directory and attorneys for creditor stated that notices should be addressed to them, it was proper to so address to the attorney. *In re* David, 44 Misc. (N. Y.) 516, 90 N. Y. Suppl. 85.

<sup>54</sup> Gatliff v. Mackey, 31 Ky. L. Rep. 947, 104 S. W. 379 (slight difference in amount; judgment listed as note); Matteson v. Dewar, 146-Ill. App. 523.

Where neither names of creditors nor judgment nor claim on which it was based was correctly inserted, the discharge is not a bar. Bernheim v. Bloch, 45 Misc. (N. Y.) 581, 91 N. Y. Suppl. 40.

<sup>56</sup> Delta County Bank v. McGranahan, 37 Wash. 307, 79 P. 796.

<sup>57</sup> Fifth Avenue Bldg. & Loan Assn. v, Goldberg, 22 Pa. Super. Ct. 197.

<sup>58</sup> The resort to ditto marks attempting to indicate the plaintiff's residence is in violation of both the letter and spirit of the act,

#### § 779. Rule under act of 1867.

The rule established by the present act is quite different in many respects from that under the act of 1867. Under that act, if the notice required by the statute has been duly published, the discharge was held to bar the debt, although the name of the creditor was not placed on the schedule or notice given to him.<sup>59</sup>

## § 780. Debts created by fraud or embezzlement.

Under the act of 1867 "no debt created by fraud or embezzlement of the bankrupt" was discharged. Under the act of 1898, after conflicting decisions by the state and federal courts, 61 it is now definitely settled by the decision of the supreme court, that provable debts created by fraud or embezzlement of the bankrupt are generally released by his discharge. 62 If such a debt is not provable against the

as well as the rule, and, moreover, has never been sanctioned by authority. Haack v. Theis, 51 Misc. (N. Y.) 3, 99 N. Y. Suppl. 905. 59 Hill v. Robbins, 1 Mich. (N. P.) 305; Thurmond v. Andrews, 10 Bush, 400; Payne v. Able, 7 Bush, 344; Blum v. Ricks, 39 Tex. 112; Symonds v. Barnes, 59 Me. 191; Hood v. Spencer, No. 6665 Fed. Cas., 4 McLean, 168; Knabe v. Hayes, 71 N. C. 109; Burnside v. Brigham, 49 Mass. 8 Metc. 75; Fox v. Paine, 10 Ala. 523; Strong v. Clawson, 10 Ill. 346; Stern v. Nussbaum, 47 How. Pr. (N. Y.) 489; Campbell v. Perkins, 8 N. Y. 430; Morse v. Presby, 25 N. H. 299; Magoon v. Warfield, 3 Greene (Ia.), 293; Hubbill v. Cramp, 11 Paige, N. Y. 310; Thomas v. Jones, 39 Wis. 124; Downer v. Dana, 22 Vt. 337; Russell v. Cheatham, 16 Miss. 703; Mitchell v. Singletary, 19 Ohio, 291; Pattison & Co. v. Oliver, 10 R. I. 448; Heim v. Chapman, 171 Mass. 347, though bankrupt makes payments on account.

<sup>60</sup> R. S. Sec. 5117; Forsyth v. Vehmeyer, 177 U. S. 177, 44 L. Ed. 723, and cases cited in the opinion. See Kellogg v. Kimball, 138 Mass. 441.

61 In re Butts, 120 Fed. Rep. 966,
10 Am. B. R. 16; Frey v. Torrey,
75 N. Y. Supp. 40, 8 Am. B. R.
196, affirmed on opinion below, 175
N. Y. 501; Crawford v. Burke, 201
III. 581, reversed, 195 U. S. 176, 49
L. Ed. 147, 12 Am. B. R. 659;
Watertown Carriage Co. v. Hall,
176 N. Y. 313, 11 Am. B. R. 15;
In re Cole, 106 Fed. Rep. 837, 5
Am. B. R. 780.

<sup>62</sup> Crawford v. Burke, 195 U. S.
176, 49 L. Ed. 147, 12 Am. B. R.
659; Bullis v. O'Beirne, 195 U. S.
606, 49 L. Ed. 340, 13 Am. B. R.
108; Tindle v. Birkett, 183 N. Y.
267, 564, 15 Am. B. R. 179; Jewett

estate of the bankrupt it is not discharged. Only such provable debts fraudulently created are not discharged, as are first, liabilities for obtaining property by false pretenses or false representations, and, second, debts created by the fraud or embezzlement of the bankrupt while acting as an officer or in any fiduciary capacity.<sup>63</sup>

Where the action sounds in contract for a debt the fact that the debt was created or induced by the fraud is immaterial, <sup>64</sup> although the opposite result has sometimes been reached. <sup>71</sup>

Bros. & Jewett v. Bentson, 18 S. D. 575, 105 N. W. Rep. 173; *In re* Wollock, 120 Fed. Rep. 516, 9 Am. B. R. 685; *In re* Adler (C. C. A. 2d Cir.), 144 Fed. Rep. 659, 16 Am. B. R. 414.

<sup>63</sup> B. A. 1898, Sec. 17, clauses 2 and 4, as amended Feb. 5, 1903, 32 Stat. at L. 797.

<sup>64</sup> Barnes Manufacturing Co. v. Norden, 67 N. J. L. 493, 51 A. 454; Quaker City Watch Co. v. Lamoreaux, 21 Pa. Super. Ct. 493; Collins v. McWalters, 6 Am. B. R. 593; In re Arkell, 6 Am. B. R. 650.

Judgment entered on a stipulation of compromise is a money judgment and barred by bankruptcy, though originally based on fraud. *In re* Arkell, 65 N. Y. App. Div. 130, 72 N. Y. Suppl. 555.

A judgment for an account is barred by the discharge, and the creditor can not go behind the record and show that the debt was created by fraud. Harrington & Goodman v. Herman, 72 Mo. 344, 12 S. W. 546, 179 Mo. 350, 78 S. W. 1132.

An action for money had and received is barred, although the pleadings contain a statement that the bankrupt made a representation that was not true as to the amount

of rent he had collected. *In re* Benoit, 194 N. Y. 549, 87 N. E. 1115, affirming 124 N. Y. App. Div. 142, 108 N. Y. Suppl. 889.

A debt created by a surety paying notes given to pay a defalcation of the principal is not a debt created by the defalcation of the principal, and the discharge of the defaulter is a good defense to an action by the surety against him. Leinkauf v. Wellhouse, 1 Ga. App. 670, 57 S. E. 961.

A judgment for money had and received is barred by the discharge, though the debt was created by fraud. "It is not enough that there may be fraud in the creation of the debt, and certainly that there may enough been a suppressio veri in the giving of a guaranty securing payment of the debt. The provable debt must itself have been a judgment recovered in an action for fraud. Barnes Cycle Co. v. Haines, 69 N. J. Eq. 651, 61 A. 515. If a debt originates or is founded upon an open account or upon a contract, express or implied, it is provable against the bankrupt's estate, and dischargeable though the creditor may elect to bring his action in trover as for a fraudulent con-

#### § 781, Fraud.

A discharge did not release judgments in actions for frauds under the act of 1898 before the amendment of 1903. The act of 1867 did not contain a similar exemption in terms. It was, however, held under that act that a judgment upon a debt fraudulently created did not merge the debt in the judgment so as to take it out of the provision in that act that "no debt created by fraud or embezzlement of the bankrupt shall be discharged." 74 It was held under that act that, where a judgment was recovered for a fraudulent debt created by two persons, one of whom afterwards received a discharge, and the other purchased the judgment, he might enforce the judgment against the discharged bankrupt, as there could be no contribution between wrongdoers.75 A debt created by fraud which has not gone to judgment is not released because of clause 4 of Section 17,78 and the fraud must be actual and not constructive.77

version instead of in assumpsit for a balance due upon an open account. Crawford v. Burke, 195 U. S. 176, 49 L. Ed. 147, 12 Am. B. R. 659, reversing 201 III. 581; Tindle v. Birkett, 205 U. S. 183, 51 L. Ed. 762,

71 It is a debt created by fraud to buy goods not intending to pay for them, but to assign them while insolvent to a favored creditor, leaving no property to pay with and such debt is not discharged in bankruptcy. Louisville Dry Goods Co. v. Lanman (Ky. 1909), 121 S. W. 1042. The creditor is not estopped from suing for a sale induced by fraud by proving the notes given in bankruptcy, and may sue on notes given in a sale induced by fraud, and may then amend and sue for the fraud. Standard Sewing Machine Co. v. Alexander, 68 S. C. 506, 47 S. E. 711. A false statement that a certain check was then in the mail for the debtor by which he obtained a purchase of sheep was fraudulent so not discharged by bankruptcy in Powell v. Ricker, 79 Vt. 552, 66 A. 569, 18 Am. B. R. 651.

74 R. S. Sec. 5117; In re Pitts, No.
 11190 Fed. Cas., 19 N. B. R. 63;
 Warner v. Cronkhite, No. 17180
 Fed. Cas., 6 Biss. 453. But see
 Palmer v. Preston, 45 Vt. 154.

75 Balliett v. Seeley, 34 Fed. Rep. 300, reversing 27 Fed. Rep. 507.

76 Crawford v. Burke, 195 U. S.
176, 49 L. Ed. 147, 12 Am. B. R.
659; Bullis v. O'Beirne, 195 U. S.
606, 49 L. Ed. 340, 13 Am. B. R.
108; In re Wollock, 120 Fed. Rep.
516, 9 Am. B. R. 685, and cases cited.

Burnham v. Pidcock, 58 N. Y.
 App. Div. 273, 68 N. Y. Suppl. 1007;
 Stefanini v. Sroka, 43 Misc. (N. Y.)
 614, 83 N. Y. Suppl. 167.

Whether a discharge is obtained in an action for fraud or not is a question for the court to determine, upon the inspection of the record, including the pleadings, and not one to be submitted to a jury.<sup>81</sup>

Where there is no way from the pleadings of showing that all the items in a judgment were for fiduciary fraud, the whole judgment is barred.<sup>83</sup>

Where a judgment has already been held to be for fraud, this is *res judicata* and it can not be affected by a discharge under Section 17 of the act of 1898.<sup>84</sup>

A bill by a judgment creditor to recover property fraudulently conveyed by the bankrupt is not affected by the discharge.<sup>85</sup>

A judgment based on a stipulation filed in an action for fraud is a judgment in contract and barred by the discharge, <sup>86</sup> but a judgment in an action originally for fraud entered on a stipulation after the discharge was granted is not barred by the discharge. <sup>87</sup>

If the debtor before bankruptcy induces the creditor to dismiss an action he had brought and give up his note on a promise to pay the debt based on false representations, this does not give the creditor a new action in fraud, but he

Fraud must be the gist of the action, whatever its form—whether ex delicto or not. Moody v. Muscogee Mfg. Co. (Ga., 1910), 68 S. E. 604. A bill by a judgment creditor to recover property, fraudulently conveyed by the bankrupt is not affected by the discharge. Bunch v. Smith, 116 Tenu. 201, 93 S. W. 80.

Fraud in statute of 1867 applies to implied as well as actual fraud, and therefore includes a *devastavit* of an executor by selling property below proper figure. Jones v. Clark, 25 Gratt. (Va.), 642.

<sup>81</sup> Flanagan v. Pearson, 42 Tex. 1; Burnham v. Pidcock (N. Y. Sup. Ct.), 5 Am. B. R. 590; Bullis v. O'Beirne, 195 U. S. 606, 49 L. Ed. 340, 13 Am. B. R. 108. A judgment recovered on money counts is not excepted from the operation of a discharge under Section 17 as a judgment in an action for fraud. Barnes Mfg. Co. v. Norden, 7 Am. B. R. 553.

83 Cooke v. Plaisted, 181 Mass.82, 62 N. E. 1054.

<sup>84</sup> Iberreich v. Foster, 148 III. App. 397.

85 Bunch v. Smith, 116 Tenn. 201,93 S. W. 80.

86 Cushman v. Arkell, 72 N. Y. Suppl. 555.

<sup>87</sup> Stevens v. Meyers, 8 Am. B. R. 496.

did not lose his original cause of action which is barred by the discharge.<sup>88</sup>

The clause in regard to judgments for frauds was omitted from the amendment of 1903,89 and 1910.

The mere fact that the gravamen of a complaint is fraud, not created while acting in a fiduciary capacity, will not prevent the operation of the discharge since the amendment of 1903, though formerly it would.<sup>90</sup>

## § 782. Waiver of fraud.

Proving a claim on an account in bankruptcy is not an election to rely only on the contract indebtedness and give up the right to proceed to recover the same debt as created by fraud and not discharged in bankruptcy.<sup>91</sup> The creditor's proof of claim and receipt of dividends in bankruptcy does not estop him after the discharge from bringing an action in deceit, as deceit is not based on a rescission of the contract, but affirms it.<sup>92</sup>

It is a question for the jury whether suing on notes is a waiver of the fraud in their inception where the plaintiff subsequently amends and sues in tort. 93 The creditor is not barred from an action of deceit by the fact that he filed an objection to the discharge setting up the obtaining of property on credit by a false statement, which was the ground of his action of deceit, and that the court held the objection insufficient as matter of law and granted the discharge, the creditor introducing no evidence. 94

<sup>88</sup> Jenkins v. Pilcher, 17 Detroit Leg. N. 104, 125 N. W. 355.

89 32 Stat. at L. 797.

<sup>90</sup> In re Thaw, 180 Fed. Rep. 419, 24 Am. B. R. 759.

91 Frey v. Torrey, 175 N. Y. 501,
67 N. E. 1082, affirming 70 N. Y.
App. Div. 166, 75 N. Y. Suppl. 40;
Standard Sewing Machine Co. v.
Kattell, 132 N. Y. App. Div. 539,
117 N. Y. Suppl. 32.

92 Talcott v. Friend (C. C. A.
 7th Cir.), 179 Fed. Rep. 676, 103 C.
 C. A. 80, 24 Am. B. R. 708.

98 Standard Sewing Machine Co. v. Alexander, 68 S. C. 506, 47 S. E. 711.

94 Talcott v. Friend (C. C. A. 7th Cir.), 179 Fed. Rep. 676, 103 C. C. A. 80, 24 Am. B. R. 708.

## § 783. Judgment for costs.

A judgment for costs even in a criminal case for forgery is barred by the discharge as it is not created by fraud.<sup>95</sup>

## § 784. Misappropriation.

It will be observed that clause 4 of Section 17 is substantially a re-enactment of the provision of the act of 1867,96 with the addition of the word "misappropriation" after "embezzlement." It is a new word in bankrupt laws. It is not contained in the English statutes nor in the former United States statutes on the subject of bankruptcy.

The word "misappropriation," construed by the maxim noscitur a sociis, means something like embezzlement. means the fraudulent misapplication of funds intrusted to an officer or person acting in a fiduciary capacity for a particular purpose. It is not necessary that the bankrupt actually embezzles the property or that he reaps any benefit personally from the transaction. It is sufficient if he fraudulently deals with the money, goods, securities, etc., intrusted to him in a fiduciary capacity; or as an officer of a corporation fraudulently misapplies any of its 'property; or as a public officer fraudulently misapplies public funds which come into his possession. In order to constitute misappropriation the misuse must be tainted with fraud.97 The misuse of trust funds owing to bad judgment will not constitute misappropriation. The payment of an extravagant price for services or materials properly appertaining to the business of the corporation is not misappropriation by an officer of the corporation.98 In order to constitute a misappropriation of negotiable paper there must be fraudulent perversion of the original object or design.99

<sup>95</sup> Olds v. Forrester, 126 Iowa,156, 102 N. W. 419.

<sup>96</sup> R. S. Sec. 5117.

<sup>97</sup> Jackson v. First Nat. Bank, 42 N. J. L. 177; Fox v. Hale & Norcross Silver Mining Co., 108 Cal.

<sup>369, 426;</sup> Winchester v. Howard, 136 Cal. 432.

<sup>98</sup> Fox v. Hale & Norcross Silver Mining Co., 108 Cal. 369, 426.

 <sup>&</sup>lt;sup>99</sup> Jackson v. First Nat. Bank, 42
 N. J. L. 177.

It was suggested in an early case <sup>100</sup> that the word "misappropriation" applied to debts arising from the misuse or perversion of the property of a principal by a factor, agent, commission merchant, etc. Since the decision in Crawford v. Burke, <sup>1</sup> holding that clause 4 of Section 17 applies only to debts created by the bankrupt "while acting in an official character or in a fiduciary capacity," it is clear that misappropriation does not apply to debts of factors, etc., which are not fiduciary debts.<sup>2</sup>

# § 785. ''Fiduciary capacity'' in general.

The act as amended limits debts excepted from the discharge to those created by the bankrupt while acting as an officer or "in any fiduciary capacity." <sup>3</sup>

The construction of clause 4 of Section 17 resulted in widely different opinions by the courts as to the effect of a discharge upon fraudulent debts. Some courts held that "fraud" should be segregated from the qualifying language "while acting as an officer or in any fiduciary capacity," and that all debts created by fraud were not discharged.<sup>4</sup> Other courts held that all debts created by fraud were discharged, except those created while acting in an official character or in any fiduciary capacity.<sup>5</sup> When the question reached the

<sup>100</sup> Frey v. Torrey, 8 Am. B. R. 196, 75 N. Y. Supp. 40.

<sup>1</sup> 195 U. S. 176, 49 L. Ed. 147, 12 Am. B. R. 659:

<sup>2</sup> Sec. 785, post.

<sup>8</sup> B. A. 1898, Sec. 17a (4), as amended February 5, 1903; Claffin Dry Goods Co. v. Eason, 2 Am. B. R. 263.

<sup>4</sup> Frey v. Torrey, 75 N. Y. Supp. 40, 8 Am. B. R. 196, affirmed on opinion below, 175 N. Y. 501; Crawford v. Burke, 201 III. 581, reversed, 195 U. S. 176, 49 L. Ed

147, 12 Am. B. R. 659; In re Butts.
120 Fed. Rep. 966, 10 Am. B. R.
16; Watertown Carriage Co. v.
Hall, 176 N. Y. 313, 11 Am. B. R.
15; Hyde & Sons v. Lesser, 12 Am.
B. R. 659.

<sup>5</sup> Goodman v. Herman, 172 Mo. 344, 72 S. W. 546, Gee v. Gee, 84 Minn. 384, 7 Am. B. R. 500; *In re* Wollock, 120 Fed. Rep. 516, 9 Am. B. R. 685; *In re* Rhutassel, 96 Fed. Rep. 597, 2 Am. B. R. 697; *In re* Bullis, 73 N. Y. Supp. Ct. 1047, 7 Am. B. R. 238, affirmed, 195 U. S.

supreme court it held that clause 4 of Section 17 is limited to frauds, embezzlements, misappropriations or defalcations while acting in an official character or in a fiduciary capacity, but does not apply to other debts or obligations fraudulently created.<sup>6</sup>

#### § 786. Technical trusts—Executors, trustees, etc.

The phrase "while acting in any fiduciary capacity" relates to special trusts, and does not include those trusts which the law implies from the contract, and which form an element in every agency and in nearly all the commercial transactions in the country. It is confined to technical trusts, and the fiduciary character is not that which the debt gives rise to, but must exist independently of it. 10

A sum of money to which a wife was entitled on the sale of certain real estate in partition proceedings was decreed to be paid to her husband to have the use of the interest and give bond for the payment of the principal at his death or when ordered to do so by the court. In an action to recover

606, 49 L. Ed. 340, 13 Am. B. R. 108; Morse & Rogers v. Kaufman, 7 Am. B. R. 549; *In re* Ennis & Stoppani, 171 Fed. Rep. 755, 22 Am. B. R. 679. See Forbes v. Keyes, 193 Mass. 38, 78 N. E. 733.

<sup>6</sup> Crawford v. Burke, 195 U. S.
176, 49 L. Ed. 147, 12 Am. B. R.
659; Bullis v. O'Beirne, 195 U. S.
606, 49 L. Ed. 340, 13 Am. B. R.
108; Tindle v. Birkett, 205 U. S.
183, 51 L. Ed. 762.

<sup>7</sup> In re Benedict, 75 N. Y. Supp. 165, 8 Am. B. R. 463; Bracken v. Milner, 104 Fed. Rep. 522, 5 Am. B. R. 23; Crosby v. Miller, Vaughn & Co., 25 R. I. 172; Goodman v. Herman, 172 Mo. 344; Gee v. Gee, 84 Minn. 384, 7 Am. B. R. 500; Chapman v. Forsyth, 2 How. 202, 11 L. Ed. 236; Hennequin v. Clewes, 111

U. S. 676, 28 L. Ed. 565; Palmer v. Hussey, 119 U. S. 96, 30 L. Ed. 362, affirming 87 N. Y. 303; Ehrhart v. Rork, 114 Ill. App. 509; Duell v. Israel, 2 Ky. L. Rep. 315; Ruff v. Milner, 92 Mo. App. 620, trustee and agent.

Where the bankrupt took money on an agreement to use it to buy exchange, this is a fiduciary purpose under the act of 1867. Herman v. Lynch, 26 Kan. 433, 40 Am. Rep. 320. Fiduciary capacity does not refer solely to a technical trust, but includes a surviving partner appropriating partnership funds. Haggerty v. Badkin, 72 N. J. 473, 66 A. 420.

<sup>10</sup>Bracken v. Milner, 104 Fed.Rep. 522, 5 Am. B. R. 23.

such a principal sum it was held that the liability incurred by the husband was incurred while acting in a fiduciary capacity, and was not discharged by proceedings in bankruptcy.<sup>11</sup>

A discharge does not release a debt due by a testamentary trustee, executor, administrator, or guardian, as such. These are the special or technical trusts, which have been uniformly held to create obligations not released by a discharge. Thus it has been held to be a fiduciary debt where a sum of money is due from an executor, as such, for the residuary legatee, 12 or where a guardian fails to account for money belonging to his wards. In such cases a surety of the bankrupt, having paid his liability on a bond, may recover such amount from the bankrupt out of property acquired after the discharge. 13

It should, however, be observed that the debt must be due from the trustee, executor, administrator, or guardian in his official capacity. An individual indebtedness, even though connected with the trust estate, is not a fiduciary debt. Thus where a guardian gave his note under seal to the ward's husband in settlement of his account and received a release from them he was held not liable in a fiduciary capacity. Where a note is given as new evidence of an old debt, without a release, no release of the debt is effected by the discharge. Where an executor gave his personal guarantee of a claim of a creditor against the testate's estate the guarantee was held an ordinary debt and not one created while acting in a fiduciary capacity. If

A conveyance to hinder and delay creditors where no express written trust is declared is not a conveyance in a fiduciary capacity.<sup>17</sup>

<sup>&</sup>lt;sup>11</sup> Mock v. Howell, 101 N. C. 443.

<sup>&</sup>lt;sup>12</sup> Crisfield v. State, 55 Md. 192.

<sup>13</sup> Carlin v. Carlin, 8 Bush (Ky.),141; Halliburton v. Carter, 55 Mo.435.

<sup>&</sup>lt;sup>14</sup> Coleman v. Davies, 45 Ga. 489. See also Elliot v. Higgins, 83 N. C. 459.

<sup>&</sup>lt;sup>15</sup> Madison v. Dunkle, 114 Ind. 262.

v. Barnes, 49 N. H. 312.

<sup>&</sup>lt;sup>17</sup> Reeves v. McCracken, 13 Am. B. R. 680.

## § 787. Attorneys.

An attorney, who collects debts for a client, has been held to act in a fiduciary capacity, and will not be released by a discharge from his obligation to pay the money to his client. Where an attorney acts as a gratuitous bailee, and his liability is merely for negligence in failing to return a note, he is released by a discharge. 19

#### § 788. Bailees.

A simple liability as bailee is barred by the discharge.<sup>20</sup> A debt created by a deposit of money with defendant as a share of the capital of a proposed partnership is a debt of a fiduciary character within Section 17(4).<sup>24</sup>

## § 789. Buyer and seller.

There is no fiduciary capacity in the relation of buyer and seller of goods though the sale was induced by fraud.<sup>25</sup>

## § 790. Factor or agent-Broker.

A factor, commission merchant, or agent, who has sold property of his principal and has failed to pay over to him

<sup>18</sup> Heffren v. Leroy, 39 Ind. 171; Heffren v. Jayne, 39 Ind. 463; Flanagan v. Pearson, 42 Tex. 1; White v. Platt, 5 Den. (N. Y.) 274. But see Wolcott v. Hodge, 81 Mass. 547; Williamson v. Dickens, 5 Ired. Law (N. C.), 259.

<sup>19</sup> McAdoo v. Lummis, 43 Tex. 227.

<sup>20</sup> McAdoo v. Lummis, 43 Tex. 277 (negligence). A naked bailee of money under an express agreement to keep safely and pay over on request is not acting in a fiduciary capacity within Sec. 17 (4), and the bailee's discharge is a defense to an action for conversion of the money, though in fact he is guilty of grand larceny. Lewis v. Shaw, 19 Am. B. R. 866. Where

one gave the bankrupt money for safe keeping this made the bankrupt a naked bailee, and he was not acting in a fiduciary capacity under the bankruptcy act. Lewis v. Shaw, 122 N. Y. App. Div. 96, 106 N. Y. Suppl. 1012. Mere failure to account for securities deposited with the bankrupt for sale is not fraud or embezzlement in a fiduciary capacity in the absence of proof of wrongful and fraudulent intent. Georgia R. R. v. Cubbedge & Hazelhurst, 75 Ga. 321.

<sup>24</sup> Haggerty v. Badkin, 72 N. J. Eq. 473, 18 Am. B. R. 302.

Harrington & Goodman v. Herman, 172 Mo. 344, 72 S. W. 546, 60
 L. R. A. 885, 179 Mo. 350, 78 S. W. 1132.

the proceeds, is held not to owe to him a debt created in a fiduciary capacity,26 but the factor's refusal to return goods on a ground not legally tenable may make the claim one created by fraud and so not barred by the discharge.30

Where a broker, to secure a debt from himself, hypothecates securities which had been pledged to him to secure the obligation of another, and failed to return them when such obligation was discharged, he was held not thereby to create a debt in a fiduciary capacity.31

#### § 791. Officers.

A discharge in bankruptcy does not release a bankrupt from a debt which was created by his defalcation while act-

<sup>26</sup> In re Benedict, 75 N. Y. Supp. 165, 37 Misc. 230, 8 Am. B. R. 463; Knott v. Putnam, 107 Fed, Rep. 907, 6 Am. B. R. 80; In re Basch, 97 Fed. Rep. 761, 3 Am. B. R. 235; Chapman v. Forsyth, 2 How. 202, 11 L. Ed. 236.

In Crawford v. Burke, 195 U. S. 176, 189, 49 L. Ed. 147, 12 Am. B. R. 659, the Supreme Court said: "We may remark here in passing that ever since the case of Chapman v. Forsyth, 2 How, 202, this court has held that a commission merchant and factor who sells for others is not indebted in a fiduciary capacity within the bankruptcy acts by withholding the money received for property sold by him. This rule was made under the bankruptcy act of 1841, and has since been repeated many times under subsequent acts." In this case the court holds that an action in tort for conversion of stock by commission brokers was discharged as tort might have been waived. In re Adler, 152 Fed. 422, 18 Am. B. R. 240 (2d Cir.); Young v. Clark, 7 Cal. App. 194, 93 P. 1056; Boyd v. Agricultural Ins. Co. 20 Colo. App. 28, 76 P. 986 (agent). Quaere whether debt due from agent for rent is one created by fraud, embezzlement, etc. Stull v. Beddeo, 78 Neb. 114, 112 N. W. 315, reversing 110 N. W. 861. In an action for conversion it appeared that the plaintiff sold wood to the defendant under a conditional contract of sale, that the defendant sold the wood and took the money in violation of that agreement, and the court holds this not to be a fiduciary debt. Bryant v. Kinyon, 127 Mich. 152, 86 N. W. 531, 8 Detroit Leg. N. 263, 53 L. R. A. 801, 6 Am. B. R. 237. See Treadwell v. Holloway, 46 Cal. 547, where a debt "created by fraud" under the act of 1867 was held to include one who receives goods consigned to him for sale and keeps the money, 30 Mathieu v. Goldberg, 156 Fed.

Rep. 541, 19 Am. B. R. 191.

31 Crosby v. Miller, Vaughn & Co., 25 R. I. 172; Hennequin v. Clewes, 111 U. S. 676, 28 L. Ed. 565; Palmer v. Hussey, 119 U. S. 96, 30 L. Ed. 362, affirming 87 N. Y. 303.

ing as an officer.<sup>32</sup> Precisely who are included in the term "officer" can not be stated. It manifestly includes all public officers. A collector of city taxes is such an officer, and a debt due from him to the municipal corporation for taxes received and not accounted for is not discharged.<sup>33</sup> So where a retiring township trustee gives his note to his successor in satisfaction of a debt due the township for funds wrongfully appropriated to his own use, it was held that the debt was not so changed thereby as to be released by a discharge.<sup>34</sup> The mere negligence of a public officer in collecting moneys, which it is his duty to collect, has been held not to be a defalcation.<sup>35</sup>

Sureties on bonds of public officers are not within the exemption. It has been held that a discharge granted to a surety will release him from any liability actually incurred upon his bond, even though his principal is guilty of a defalcation.<sup>36</sup>

An officer of a national bank having the management and control of its affairs is acting in a fiduciary capacity and an indebtedness arising from the embezzlement or misappropriation of the funds of the bank by him is not discharged.<sup>37</sup>

## § 792. Partners.

The implied trust relations existing between partners does not bring their affairs within the definition of the excepted

<sup>32</sup> B. A. 1898, Sec. 17, clause 4.
 <sup>33</sup> Morse v. Lowell, 48 Mass. 7
 Metc. 152; Richmond v. Brown, 66
 Me. 373.

<sup>84</sup> Madison v. Dunkle, 114 Ind. 262.

35 Courtney v. Beale, 84 Va. 692.
36 McMinn v. Allen, 67 N. C. 131; Steele v. Graves, 68 Ala. 21; Fowler v. Kendall, 44 Me. 448; Jones v. The People, 72 Ill. 435; Jones v. Knox, 46 Ala. 53; Saunders v. Commonwealth, 10 Grat. (Va.) 494. But see United States v. Herron, 20 Wall. 251, 22 L. Ed. 275.

37 Harper v. Rankin (C. C. A. 4th Cir.), 141 Fed. Rep. 626, 15 Am. B. R. 608; Gerner v. Yates (Neb. 1900), 84 N. W. 596 (bank officer); Shepard v. Morgan, 123 N. Y. App. Div. 128, 108 N. Y. Suppl. 379 (fraudulent act by officer of corporation). Where a stockholder delivers stock to the secretary for transfer with a request to issue a new certificate to him his claim is not barred by the discharge of the corporation. In re Clipper Mfg. Co. (C. C. A. 2d Cir.), 179 Fed. Rep. 843, 103 C. C. A. 260, 24 Am. B. R. 683.

term "fiduciary," <sup>39</sup> although an appropriation of partner-ship funds by a surviving partner may be a breach of a fiduciary relation. <sup>40</sup>

## § 793. Stockholders' Liability.

A balance due on the subscription to capital stock of a corporation has been held not to be a fiduciary debt.<sup>41</sup>

## § 794. Codebtors not discharged.

The liability of a person who is a codebtor with, or guarantor, or in any manner a surety for a bankrupt, is not altered by the discharge of such bankrupt.<sup>42</sup>

This section applies to the discharge in bankruptcy, and does not refer to nor have in view any act of the parties effecting a release of liability in law or in equity. <sup>45</sup> It applies to sureties liable for the debts of the bankrupt existing before and which would be released by his discharge. <sup>46</sup>

See v. Gee, 84 Minn. 384, 5 Am.
B. R. 500; Hill v. Sheibley, 68 Ga.
556.

<sup>40</sup> Haggerty v. Badkin, 72 N. J. Eq. 473, 66 A. 420.

<sup>41</sup> Morrison v. Savage, 56 Md. 142. <sup>42</sup> B. A. 1898, Sec. 16. Compare

\*2 B. A. 1898, Sec. 16. Compare R. S. Sec. 5118; Boyd v. Agricultural Ins. Co., 20 Colo. App. 28, 76 P. 986.

Wife mortgaging real estate to secure husband's debt becomes surety of her husband and discharge of husband does not release her from liability on the mortgage. Burtis v. Wait, 33 Kan. 478, 6 P. 783.

The discharge of the principal does not affect the surety though "sureties agree to be liable without notice so long as there is any liability of the principal." Wolfboro Loan & Banking Co. v. Rollins, 195 Mass. 323, 81 N. E. 204. See Cochrane v. Cushing, 124 Mass. 219.

<sup>45</sup> In re McDonald, No. 8753 Fed. Cas., 24 Pitts. L. J. 42; Matter of Benedict, 18 Am. B. R. 604 (accepting payments in composition from the estate of the maker relieves the indorser).

46 Carpenter v. Turrell, 100 Mass. 450; Odell v. Wootten, 38 Ga. 224; Knapp v. Anderson, 71 N. Y. 466; Wolf v. Stix, 99 U. S. 1, 25 L. Ed. 309; Klipstein & Co. v. Allen-Miles Co. (C. C. A. 5th Cir.), 136 Fed. Rep. 385, 14 Am. B. R. 15.

The fact that one of the codebtors has received a discharge will not prevent the creditor from suing any one else liable on the same debt; and proceedings pending against others, and unsatisfied judgments already obtained against others for the same debt, are not affected by a discharge or surrendered by proving the debt.<sup>47</sup>

Thus the discharge of the maker in no way affects the endorser.<sup>48</sup> There is no obligation resting on the creditor to prove his claim in bankruptcy.<sup>49</sup> The bankrupt statute protects the surety in such cases.<sup>50</sup>

One of several joint debtors discharged in bankruptcy may be made a party to a suit upon a debt from which he is discharged.<sup>51</sup> The reason for this is that the discharge is a personal privilege which he may or may not plead as a defense. If he does not plead his discharge a judgment may be entered against him.<sup>52</sup>

#### § 795. Guarantors.

It has been held that a guarantor for rent under a lease was not released of his obligation by the discharge of the lessee.<sup>58</sup>

47 In re Levy, No. 8297 Fed. Cas., 2 Ben. 169; Payne v. Abel, 7 Bush (Ky.), 344; Moore v. Waller, 1 A. K. Marsh. (Ky.) 488; Bowery Savings Bank v. Clinton, 2 Sandf. (N. Y.) 113; Seldner v. Smith, 40 Md. 602; Phillips v. Solomon, 42 Ga. 192.

<sup>48</sup> King v. Central Bank, 6 Ga. 257; Clopton v. Spratt, 52 Miss. 251; National Bank of South Reading v. Sawyer, 177 Mass. 490, 6 Am. B. R. 154.

<sup>49</sup> Clopton v. Spratt, 52 Miss. 251; National Bank of South Reading v. Sawyer, 177 Mass. 490, 6 Am. B. R. 154.

<sup>50</sup> 1898, Sec. 57i.

<sup>51</sup> Jenks v. Opp, 43 Ind. 108;

Camp v. Gifford, 7 Hill (N. Y.), 169.

<sup>52</sup> See pleading a discharge, Sec. 802, post.

Witthaus v. Zimmerman, 91 N.
 Y. App. Div. 202, 11 Am. B. R.
 314.

Sureties on a lease are liable for rent accruing after the adjudication. "It is immaterial whether the rent accrued before or after the act of bankruptcy." Dersch v. Walker, 28 Ky. L. Rep. 325, 89 S. W. 233. An adjudication does not terminate a lease and an indorser of notes given for rent accruing after the discharge is still liable thereon. Bernhardt v. Curtis, 109 La. 171, 94 Am. St. Rep. 445, 33 S. 125.

### § 796. Partners as codebtors.

The provision quoted above undoubtedly includes partners jointly liable, although they are not expressly mentioned in the section.<sup>56</sup> A judgment against a firm is not released by the discharge of a partner.<sup>57</sup> Where two general partners are discharged, a special partner can not avail himself of their discharge to bar an action against him on a firm obligation.<sup>58</sup>

## § 797. Sureties on attachment bonds—Special judgments.

The question of the effect of a discharge on the liability of sureties on bonds given by the bankrupt, to release property of his which had been attached, where the suit was pending at the time of the commencement of bankruptcy proceedings, was variously answered by the courts under the act of 1867. Some held when a discharge had been granted to a bankrupt, pending a suit in which a judgment on his property had previously been dissolved by the giving of a bond, no judgment could be subsequently entered against him or his sureties. Others held otherwise. The question came before the supreme court ten years after the bankrupt act had been repealed in the case of Hill v. Harding.<sup>59</sup> It was held in that case that where the attachment of property in an action in the state court was dissolved by the defendant entering into a bond with sureties to pay any final judgment, and the defendant after a verdict against him obtained his discharge in bankruptcy, the bankrupt act did not prevent the

<sup>56</sup> As to the effect of a discharge upon partners, see Sec. 278, ante. See also *In re* Dillon, 100 Fed. Rep. 627, 4 Am. B. R. 63.

<sup>57</sup> Dodge v. Kaufman, 91 N. Y. Supp. 727.

58 Abendroth v. Van Dolsen, 131
 U. S. 66, 33 L. Ed. 57.

\*\*9 130 U. S. 699, 32 L. Ed. 1083;
 In re Martin, 105 Fed. Rep. 753,
 5 Am. B. R. 423, the court of bank-

ruptcy enjoined the prosecution of such a suit under Sec. 11.

In Marx v. Hart, 166 Mo. 503, 8: Am. B. R. 438n, a judgment was entered against the garnishees before bankruptcy, which was a lien under the local law and was not released by the discharge of the debtor, 130 U. S. 699, 32 L. Ed. 1083,

state court from rendering judgment against him on the verdict, with a perpetual stay of execution, so as to leave the plaintiff at liberty to proceed against the sureties. In that case the court said: "If the sureties should ultimately pay the amount of any such judgment, and thereby acquire a claim to be reimbursed by their principal, the amount so paid (which is a point not now in issue), it would be because his liability to them upon such claim did not exist at the time of the commencement of the proceedings in bankruptcy, and therefore could not be proved in bankruptcy nor barred by the discharge, and consequently would not be affected by any provision of the bankrupt act."

Whether a state court can render a formal judgment against the debtor for the single purpose of charging such sureties depends upon the authority of the state court under the local law.<sup>60</sup>

If the state court does not have the power, or, having the power, does not exercise it, to render such judgment the surety is released.<sup>62</sup> The reason is that the surety in such case is bound only to pay the judgment that may be ren-

60 Klipstein & Co. v. Allen-Miles Co. (C. C. A. 5th Cir.), 136 Fed. Rep. 385, 14 Am. B. R. 15; Hill v. Harding, 130 U. S. 699, 32 L. Ed. 1083.

Special judgments were properly entered in the following cases: Simpson v. Minnix, 30 App. Cas. (D. C.), 582; Danforth Mfg. Co. v. M. L. Barrett & Co., 138 III. App. 244; Rosenthal v. Nove, 175 Mass. 559, 78 Am. St. Rep. 512; King v. Will J. Block Amusement Co., 193 N. Y. 608, 86 N. E. 1126, affirming 126 N. Y. App. Div. 48, 111 N. Y. Suppl. 102; Ûnited States Wind Engine Co. v. North Penn. Iron Co., 227 Pa. St. 262, 75 A. 1094.

62 In Klipstein v. Allen-Miles Co. (C. C. A. 5th Cir.), 136 Fed. Rep. 385, after considering the

state statute the court said: "The condition of the bond dissolving the garnishment is for the payment of the judgment that shall be rendered on the garnishment proceedings. This must be taken to mean for the payment of such a judgment as could have been rendered against the garnishee if the bond had not been given. Guilford v. Reeves, 103 Ala. 301, 15 South. 661; Collins v. Baldwin, 109 Ala. 402, 19 South. 862. No judgment could have been rendered against the garnishee on the garnishment proceedings, if the bond had not been given, because such proceedings were invalidated by the adjudication in bankruptcy."

In Wolf v. Stix, 99 U. S. 18, 25 L. Ed. 309, the supreme court said: "The cases are numerous in which

dered in the specified action. If no judgment results, the event has not happened on which the liability of the surety was made to depend. In other words, the liability of the surety rests upon the terms of his undertaking. Section 16 of the bankrupt act does not enlarge the liability of the surety, but only preserves such liability as may exist under the terms of his suretyship from being released by the discharge of his principal.

An attachment lien which is avoided by Section 67f can not be enforced by judgment and therefore the surety on the attachment bond will be released.\*

If such proceedings in the state court are stayed under Section 11 until the time within which to obtain a discharge has expired, no judgment can be rendered, if he pleads his discharge, except a formal judgment for the purpose of charging the sureties. It then falls under the rule above stated. If no discharge is obtained neither the principal nor the sureties are released. Where a trustee is subrogated for an attachment creditor under Section 67f of the bankrupt act, he can only enforce the lien against the property attached and no liability of the sureties arises as in case of a personal judgment.

## § 798. Sureties on various bonds.

A surety on an appeal bond is not released when the discharge can not affect the appeal or stay proceedings upon it

it has been held, and we think correctly, that if one is bound as surety for another to pay any judgment that may be rendered in a specified action, if the judgment is defeated by the bankruptcy of the person for whom the obligation is assumed, the surety will be released. The obvious reason is that the event has not happened on which the liability of the surety was made to depend. Of this class of obligations are the ordinary bonds in attachment suits to dissolve an

attachment, appeal bonds, and the like."

In Payne v. Able, 70 Ky. 344, the court said: "No judgments were or could have been rendered againts Able, and hence the contingencies upon which they [the sureties on an attachment bond] were to become liable as sureties have not arisen, and can not now arise."

\* Crook-Horner Co. v. Gilpin

(Md. 1910), 75 Atl. 1049. See, however, Rice v. Nirdlinger, 41 Pa. Super. Ct. 238.

or prevent a judgment therein.<sup>63</sup> If the debtor could have availed himself of his discharge to prevent a judgment and terminate the appeal and the action before judgment, or a dismissal of the appeal, the surety would have been released, for the obvious reason that the contingency upon which his liability was made operative could not arise.<sup>64</sup>

A discharge does not have the effect of releasing a liability of a surety upon replevin bonds; <sup>66</sup> an injunction bond <sup>67</sup> or a bond to avoid a levy <sup>68</sup> or upon an administrator's <sup>69</sup> or auctioneer's bond, <sup>70</sup> banker's <sup>70\*</sup> or constable's bond <sup>71</sup> or jail bonds, <sup>72</sup> except where the bankrupt leaves the prison limits after he receives his discharge. <sup>73</sup>

However, the discharge releases both principal and surety on a bond to release the principal from arrest on execution 74

63 Knapp v. Anderson, 71 N. Y.
466, affirming 7 Hun (N. Y.), 295;
Hall v. Fowler, 6 Hill (N. Y.),
Slusher v. Hopkins, 30 Ky. L. Rep.
257, 97 S. W. 1128;
St. Louis World
Pub. Co. v. Rialto Grain Co., 108
Mo. App. 479, 83 S. W. 781.

64 Goyer v. Jones, 79 Miss. 253,
8 Am. B. R. 437; Odell v. Wootten,
38 Ga. 224; Otto Young & Co. v.
Howe, 150 Ala. 157, 43 S. 488.
See Coe v. Waters, 16 Colo. App. 311, 64 P. 1054.

Section 16 may not apply to sureties on an appeal bond, as they are released where the bond was given within four months of bankruptcy, and no judgment was rendered on appeal against the principal on account of the discharge. House v. Schnadig, 235 III. 301, 85 N. E. 395, affirming 138 III. App. 498.

<sup>66</sup> Flagg v. Tyler, 6 Mass. 33. See also Wolf v. Stix, 99 U. S. 1, 25 L. Ed. 309.

67 Stull v. Beddeo, 78 Neb. 119,

112 N. W. 315, reversing 110 N. W. 861.

68 Pinkard v. Willis, 24 Tex. Civ. App. 69, 57 S. W. 891.

<sup>69</sup> Moore v. Waller, 1 A. K. Marsh. (Ky.) 488; Miller v. Gillespie, 59 Mo. 220.

70 Jones v. Russell, 44 Ga. 460.
 70\* Mattone v. Illinois Surety
 Co., 123 N. Y. Suppl. 236.

71 Leader v. Mattingly, 140 Ala. 444, 37 S. 270, where no breach had occurred at the date of the adjudication.

<sup>†2</sup> Dyer v. Cleaveland, 18 Vt. 241; Claffin v. Cogan, 48 N. H. 411; Goodwin v. Stark, 15 N. H. 218.

Under Sec. 16 a surety on a poor debtor's recognizance is not discharged by his discharge in bankruptcy. Carpenter v. Goddard, 191 Mass. 54, 76 N. E. 53.

78 Kirby v. Garrison, 21 N. J. L. 17.

<sup>74</sup> Almon H. Fogg Co. v. Bartlett, 106 Me. 122, 75 A. 380. and where a bail bond is given in an action to secure a debt and the debt is discharged by the debtor's bankruptcy, the surety is discharged thereby, the relation of principal and bail being at an end.75

#### § 799. Contribution.

Where one of several cosureties is discharged, so that he is released from his liability as such, he is also released from the duty of contribution to his cosureties.76

The surety's claim for contribution for a payment made after the filing of the petition not usually barred by the discharge.77

#### § 800. Stockholders' liability.

A judgment in a "stockholders' liability" suit against the stockholders severally, for the par value of their respective holdings, is a provable debt against a nonresident bankrupt stockholder's estate and is released by his discharge.80

The statutory liability of officers and stockholders of a corporation, being in the nature of surety, is not released by the discharge of the corporation. The amendment of Feb-

75 Keyes v. Bennett, 218 Ill. 625, 75 N. E. 1075, affirming 122 Ill. App. 60.

<sup>76</sup> Tobias v. Rogers, 13 N. Y. 59. But see Miller v. Gillespie, 59 Mo. 220.

77 Smith v. McQuillin, 193 Mass. 289, 79 N. E. 401; Goding v. Roscenthal, 180 Mass. 43, 61 N. E. 222. But see contra, Smith v. Wheeler, 55 N. Y. App. Div. 170, 8 N. Y. Ann. Cas. 281, 66 N. Y. Suppl. 780.

Under other statutes see Hays v. Ford, 55 Ind. 52; Dunn v. Sparks, Smith, 219 (Ind. 1849), citing Clements v. Langley, 5 B. & Ad. 372; Thompson v. Thompson, 2 Bing. N. Cas. 168.

Where a note is due when the maker files his petition in bankruptcy and is duly scheduled and subsequently the surety is forced to pay the note the claim of the surety was provable as a fixed liability and is barred by the discharge. Hayer v. Comstock, 115 Iowa, 187, 88 N. W. 351.

80 Dight v. Chapman, 44 Ore. 265, 75 Pac. 585; Longfield v. Minnesota Savings Bank, 95 Minn, 54, 14 Am, B, R. 413.

ruary 5, 1903, expressly provides that the bankruptcy of a corporation shall not release its officers, directors or stockholders, as such, from any such liability.81 A suit to enforce such statutory liability may be maintained against such officers or stockholders notwithstanding the fact that the corporation has obtained a discharge.82 A court of bankruptcy may refuse to stay a suit against the corporation, but may permit a judgment to be entered with stay of execution for the purpose of fixing the liability of the stockholders' and officers, when such judgment is required as a condition precedent to maintaining suit to enforce the statutory liability of officers and stockholders.83 A judgment against a corporation obtained after a discharge granted and pleaded in the suit is not such a judgment as is required by the Massachusetts statute, as a condition precedent to maintain a suit to enforce the statutory liability of its officers and stockholders.84 It is error for a state court to enter such a judgment. But where the judgment is entered before the discharge is granted or when it is not pleaded it would seem to be a sufficient compliance with such statute.

## § 801. The effect of a new promise upon a discharged debt.

As has been pointed out, the effect of a discharge is to release a bankrupt from his liability for provable debts.<sup>85</sup> He is not bound in law to pay any debt released by his discharge. The moral obligation of the bankrupt to pay it remains. It is due in conscience although discharged in law, and this moral obligation, together with a subsequent promise

<sup>&</sup>lt;sup>81</sup> B. A. 1898, Sec. 4, as amended 32 Stat. at L. 974.

<sup>82</sup> Wood v. Vanderveer, 55 N. Y.
App. Div. 549; Firestone v. Agnew
(N. Y.), 21 Am. B. R. 292; Elsbree
v. Burt, 24 R. I. 322, 53 A. 60.

<sup>88</sup> In re Marshall Paper Co., 102Fed. Rep. 872, 4 Am. B. R. 468;

In re Remington Auto & Motor Co., 119 Fed. Rep. 441, 9 Am. B. R. 533

<sup>84</sup> Train v. Marshall Paper Co., 180 Mass. 513.

<sup>&</sup>lt;sup>85</sup> See general nature and effect of a discharge, Sec. 742, ante.

by the bankrupt to pay the debt, gives a right of action <sup>86</sup> only if accepted by the creditor. <sup>90</sup>

There is considerable conflict in the decisions under the former bankrupt acts, as to whether the action should be founded on the original debt or on the new promise. Some judges were of the opinion that the discharge extinguished the debt, and the only cause of action was, therefore, on the new promise. The better authority, however, is to the effect that the new promise revives a debt barred by the discharge, and that the creditor should declare on the original debt and not on the new promise. If the debt were wholly extin-

se Dusenbury v. Hoyt, 53 N. Y. 521; Maxim v. Morse, 8 Mass. 127; Fletcher v. Neally, 20 N. H. 464; Herdon v. Givens, 16 Ala. 261; Blanc v. Banks, 10 Rob. (La.) 115; Williams v. Robbins, 32 Me. 181; Spooner v. Russell, 30 Me. 454; Young v. Denslinger, 2 Ill. App. 22.

New promise is a good moral consideration, though note payable to payee individually when it should have been payable to her as administrator. Ford v. Sidebottom, 5 Ky. L. Rep. 316. To interpose the defense of bankruptcy is a personal privilege which may be waived, as by executing and delivering a cognovit. Taber v. Donovan, 156 Mich. 652, 121 N. W. 481, 16 Detroit Leg. N. 300. Surety's agreement to delay foreclosure of a mortgage was a sufficient consideration for bankrupt's agreement after discharge to pay surety. Stapp v. Thomas, 5 Ky. L. Rep. 603.

90 International Harvester Co. of America v. Lyman, 10 Am. B. R. 450; Smith v. Stanchfield, 7 Am. B. R. 498. Conditional offer not accepted is not a new promise to pay. Stern v. Bradner Smith & Co., 127 III. App. 640, affirmed, 225 III. 430, 80 N. E. 307.

Where a promise to pay is made on condition the creditor grant the debtor time, the pleadings and evidence must show that this condition was accepted or acted upon by the creditor. Smith v. Stanchfield, 84 Minn. 343, 87 N. W. 917. Promise to pay by instalments refused by creditor can not be used as basis of action on new promise. International Harvester Co. v. Lyman, 90 Minn. 275, 96 N. W. 87.

94 Eckler v. Galbraith, 12 Bush (Ky.), 71; Carson v. Osborn, 10 B. Mon. (Ky.) 155; Egbert v. Mc-Michael, 9 B. Mon. (Ky.) 44; Hobough v. Murphy, 114 Pa. St. 358; Murphy v. Crawford, 114 Pa. St. 496; Fleming v. Lullman, 11 Mo. App. 104; Ross v. Jordan, 62 Ga. 298; Horner v. Speed, 2 Patt. & H. (Va.) 616.

95 Dusenbury v. Hoyt, 53 N. Y. 309; Maxim v. Morse, 8 Mass. 127; Marshal v. Tray, 74 Ill. 379; Badger v. Gilmore, 33 N. H. 361; Apperson v. Stewart, 27 Ark. 619; Riggs v. Roberts, 85 N. C. 151; Fraley v. Kelly, 67 N. C. 78.

guished by the discharge it is hard to see what consideration would support a new promise. Upon principle, therefore, it would seem that the new promise should be considered a waiver of the discharge as a defense.

Where there is no state law requiring the promise to pay a debt discharged in bankruptcy to be made in writing, the promise may be proved by parole, and when proved is binding.<sup>96</sup>

An oral promise made before a statute requiring it to be in writing is binding, and will defeat the defense of a discharge in bankruptcy in actions subsequently brought.<sup>99</sup>

It is immaterial at what date a new promise is made. It is a sufficient consideration if the new promise is made before the discharge as well as after it.<sup>100</sup> It may, however, be

96 Hill v. Robins, 22 Mich. 474;
Barron v. Benedict, 44 Vt. 518;
Apperson v. Stewart, 27 Ark. 619;
Brooks v. Paine, 25 Ky. Law Rep. 1125;
Mutual Reserve Fund Life Ass'n v. Beatty (C. C. A. 9th Cir.),
93 Fed. Rep. 982, 35 C. C. A. 573,
2 Am. B. R. 244; Hunt v. Jones,
1 Ind. App. 545, 28 N. E. 98;
Pearsall v. Tabour, 98 Minn. 248,
108 N. W. 808; Smith v. Stahchfield, 84 Minn. 343, 87 N. W. 917,
7 Am. B. R. 498; Horner v. Speed,
2 Patt. & H. (Va.) 616.

Oral promise sufficient, though statute provides that parties may in writing agree for payment of interest. Farmers' Bank v. Richards, 119 Mo. App. 18, 95 S. W. 290.

The New York statute required the new promise to be in writing in the following cases: Tompkins v. Hazen, 30 N. Y. App. Div. 359, 51 N. Y. Suppl. 1003; 165 N. Y. App. 18, 58 N. E. 762; Bair v. Hilbert, 84 N. Y. App. Div. 621, 82 N. Y. Suppl. 1010; Mandell v. Levy, 47 Misc. (N. Y.) 147, 93 N. Y. Suppl. 545; Meyer v.

Bartels, 56 Misc. (N. Y.) 621, 107. N. Y. Suppl. 778.

<sup>99</sup> Williams v. Robins, 32 Me. 181;
Spooner v. Russell, 30 Me. 454.
But see Kingley v. Cousins, 47 Me.
91.

100 Jersey City Ins. Co. v. Archer, 122 N. Y. 376; Griel v. Solomon, 82 Ala. 85; Otis v. Gazlin, 31 Me. 567; Wheeler v. Wheeler, 28 Ill. App. 385; Dicks v. Andrews, 132 Ga. 601, 64 S. E. 788; Moore v. Trounstine, 126 Ga. 116, 54 S. E. 810; Gruenberg v. Trainor, 11 Am. B. R. 776.

In Kentucky a promise made after the filing of a petition but before the discharge, is without consideration and void as it was made while the original debt was a valid obligation. Ogden v. Redd, 13 Bush (Ky.), 58; Booth v. Wood, 5 Ky. L. Rep. 776, but a promise made after the petition is filed and before the discharge is good when made for a new consideration. Thornberry v. Dils, 80 Ky. 241, 3 Ky. L. Rep. 725.

doubted if a new promise would entitle a judgment creditor to sue execution on a judgment released by a discharge.<sup>3</sup> An original debt is revived only as of the date of the new promise.<sup>4</sup>

All the authorities agree that the promise by which a discharged debt is revived must be clear, distinct and unequivocal.<sup>5</sup>

It may be an absolute or a conditional promise, but in either case it must be unequivocal, and the occurrence of the condition must be averred, in case the promise be conditional.

The fact that no time is set for payment does not make the promise conditional.<sup>7</sup> The fact that the bankrupt makes promises with conditions attached or merely expresses an intention to pay would not operate to prevent a recovery on a clear promise to pay.<sup>8</sup>

The rule is different in regard to the defense of the statute of limitations against a debt barred by the lapse of time. In any case acts or declarations recognizing the present existence of the debt have often been held to take the case out of the statute, but not so in the class of cases relating to new promises reviving debts discharged in bankruptcy. In order to revive a discharged debt, the jury must be authorized by it to say that there is the expression by the debtor of a clear intention to bind himself to the payment of the debt.

- <sup>3</sup> Shuman v. Strauss, 52 N. Y. 404. This case was dismissed on another ground.
  - 4 Willis v. Cushman, 115 Ind. 100.
- <sup>8</sup> Craig v. Seitz, 63 Mich. 727, 30
  N. W. 347; Smith v. Stanchfield,
  84 Minn. 343, 87 N. W. 917, 7 Am.
  B. R. 498; Tyler v. Tayler, 21 Gratt.
  (Va.) 700.

Must be "strong, positive and unequivocal evidence as to the identification of the debt and as to a distinct, unconditional and present promise to pay." Pearsall

- v. Tabour, 98 Minn. 248, 108 N. W. 808
- <sup>7</sup> Sundling v. Willey, 19 S. D. 293, 103 N. W. 38.
- 8 Brooks v. Paine, 25 Ky. L. Rep. 1125, 77 S. W. 190.
- Allen v. Ferguson, 18 Wall. 1,
  L. Ed. 854; Stewart v. Reckless,
  N. J. L. 427; Fraley v. Kelly,
  N. C. 78; Pratt v. Russell, 61
  Mass. 462; Thornton v. Nichols,
  Ga. 50, 45 S. E. 785; Brooks v.
  Paine, 25 Ky. Law Rep. 1125;
  Church v. Winkley, 73 (7 Gray)
  Mass. 460.

Thus it has been held to be a sufficient promise to support an action where a debtor promises "to settle" a liquidated demand concerning which there was no dispute between the parties, 10 or where a debtor declared that he was "able and willing to pay the debt," 11 or the statement "I intend to pay," upon the happening of a particular event, 12 or writing on the face of a bill a statement "I will pay it," 13 or any agreement to pay or any words signifying an intention to pay or giving assurance that the debtor would pay (although he did not use the word promise), 14 or a promise "to pay the old debts as well as the new," 17 or a promise to pay the debt he owned "when he shall be able," 18 which promise may be enforced on proof of ability. 20

It is not necessary that the new promise be made by the bankrupt to the creditor or his authorized agent 23. It may

<sup>10</sup> Stillwell v. Cope, 4 Denio (N. Y.), 225.

<sup>11</sup> Evans v. Carey, 29 Ala. 99.

12 Dearing v. Moffitt, 6 Ala. 776.

<sup>13</sup> Gruenberg v. Trainor, 40 Misc. (N. Y.) 232, 81 N. Y. Suppl. 675.

14 Harris v. Peck, 1 R. I. 262. Statements "you shall have your money," "If I don't send only a hundred at a time you will get it." "You shall be paid in full as soon as possible," are clear pledges to pay. Sundling v. Willey, 19 S. D. 293, 103 N. W. 38.

A letter referring a matter to the bankrupt's attorney, with the statement "I — am endeavoring to have him buy the claim," was enough as a clear admission that the debt was due and showing an intention to pay. Mordaunt v. Monroe, 124 Ill. App. 306.

<sup>17</sup> Hornthal v. McRae, 67 N. C.

<sup>18</sup> Mason v. Hughart, 9 B. Mon. (Ky.) 480.

An express undertaking to liquidate the debt was found in words.

"because I have promised in time to take care of it, but I must have time to do so, as it will be done as fast as resources will allow." Nathan v. Leland, 193 Mass. 576, 79 N. E. 793.

<sup>20</sup> Krause v. Torrey, 146 Ala. 548, 40 S. 956.

Ability may be shown by inquiring into the income and necessary expenditures for support of the debtor's family. Torrey v. Krause, 149 Ala. 200, 43 S. 184. A promise to pay when able may be enforced on proof of ability. Evidence that the defendant owned property subject to the payment of debts sufficient to satisfy his claim made out a prima facie right to recovery which could be defeated by proof that the payment of debts contracted since bankruptcy would exhaust the estate. Eckler v. Galbraith, 12 Bush (Ky.), 71.

<sup>28</sup> Bennett v. Eyerett, 3 R. I. 152; Comfort v. Eisenbeis, 11 Pa. 13; Evans v. Carey, 29 Ala. 99; Haines v. Stauffer, 13 Pa. 541. be made to a third person. The refusal to give a new note is not inconsistent with a promise to pay an existing note.<sup>24</sup>

A debt revived by a new promise may be enforced although it was proved in the bankruptcy proceedings.<sup>25</sup>

If the promise is not clear, distinct and unequivocal it does not revive a debt. It is necessary that there be an express promise or an expression by the debtor of a clear intention to bind himself to the payment of the debt.<sup>26</sup> It has been held not sufficient to constitute a new promise where the debtor merely expressed an intention to pay the debt,<sup>27</sup> or declared that he "expects" or "hopes" to pay as fast as he could,<sup>30</sup> or mere admissions of the debt or acknowledgment of the obligation,<sup>32</sup> or the statement "When I am in a position to pay there is none I would more cheerfully pay," <sup>33</sup> or where he promised to give his note and did not execute it,<sup>34</sup> or where he has made

24 Pratt v. Russell, 61 Mass. 7
Metc. 462; Underwood v. Eastman,
18 N. H. 582. See also Horner v.
Speed, 2 Patt. & H. 616.

<sup>25</sup> Mason v. Hughart, 9 B. Mon. (Ky.) 480.

<sup>26</sup> Allen v. Ferguson, 18 Wall. 1, 21 L. Ed. 854; Fraley v. Kelly, 67 N. C. 78; Samuel v. Cravens, 10 Ark. 380; Sherman v. Hobart, 26 Vt. 60; Taylor v. Nixon, 4 Sneed (Tenn.), 352; Tompkins v. Hazen, 5 Am. B. R. 62.

27 Allen v. Ferguson, 18 Wall. 1,
21 L. Ed. 854; Stewart v. Reckless,
24 N. J. L. 427; Yoxtheimer v.
Keyser, 11 Pa. St. 364; Dearing v.
Moffitt, 6 Ala. 776; Church v. Winkley, 73 Mass. (7 Gray) 460; Brooks
v. Paine, 25 Ky. L. Rep. 1125, 77
S. W. 190; Horner v. Speed, 2
Patt. & H. (Va.) 616.

"I do not intend you shall lose it, I will make it all right," is insufficient. Meech v. Lamon, 103 Ind. 515, 53 Am. Rep. 540. Statement "I am going to pay that judgment" is insufficient—is merely of a purpose. Brewer v. Boynton, 71 Mich. 254, 39 N. W. 49.

<sup>80</sup> Bartlett v. Peck, 5 La. Ann. 669; Scheper v. Briggs, 28 N. Y. App. Div. 115, 50 N. Y. Suppl. 869. "You shall be paid in the near future" sounds "more like the language of prophecy than of binding obligation" in connection with other statements as to his health and payment by an insurance company and is insufficient. Moore v. Trounstine, 126 Ga. 116, 54 S. E. 810.

<sup>82</sup> Prewett v. Caruthers, 20 Miss.
491; Bennett v. Everett, 3 R. I.
152; Thornton v. Nichols & Lemon,
119 Ga. 50, 45 S. E. 785; Horner v. Speed, 2 Patt. & H. (Va.) 616.
<sup>33</sup> Kiernan v. Fox, 43 N. Y. App.
Div. 58, 59 N. Y. Suppl. 330.

.34 Porter v. Porter, 31 Me. 169.

partial payments,<sup>35</sup> or the mere payment of interest.<sup>36</sup> It has been held that the benefit of the new promise will not pass to the endorsee of a note to whom it is subsequently endorsed, for the new promise is not negotiable.<sup>37</sup>

Where the debtor has promised to pay the debt after his discharge the creditor may bring his action upon the original demand and reply the new promise in avoidance of a plea of discharge, the creditor may bring his action upon the original promise may be joined in the same petition. Where the words are capable of being construed as a promise it is for the jury to determine whether the bankrupt intended to promise to pay the debt, or whether the promise was absolute or conditional in case the evidence is conflicting.

### § 802. Pleading a discharge.

A discharge in bankruptcy may be pleaded in bar of an action founded upon a debt released by it. A state court does not lose jurisdiction of the person of a defendant by his being adjudged a bankrupt. A judgment may be rendered against him if he does not plead his discharge. Unless a defendant pleads his discharge he is deemed to have waived it as a defense.<sup>42</sup>

35 Stark v. Stinson, 23 N. H. 259; Viele v. Oglivie, 2 Greene (Ia.), 326; Needham v. Mattewson, 81 Kas. 340, 105 P. 436; Heim v. Chapman, 171 Mass. 347, 50 N. E. 529, though fraudulent; Meyer v. Bartels, 56 Misc. (N. Y.) 621, 107 N. Y. Suppl. 778.

<sup>36</sup> Cambridge Inst. v. Littlefield, 60 Mass. 210.

<sup>87</sup> Warwell v. Foster, 31 Me. 558; White v. Cushing, 30 Me. 267; Walbridge v. Harroon, 18 Vt. 448. But see Way v. Sperry, 60 Mass. 238; Underwood v. Eastman, 18 N. H. 582.

<sup>38</sup> Dusenbury v. Hoyt, 53 N. Y.
521; Maxim v. Morse, 8 Mass. 127.
In those states which held that the action must be brought upon

the new promise and not upon the original debt a different rule exists. See Egbert v. McMichael, 9 B. Mon. (Ky.) 44; Carson v. Osborn, 9 B. Mon. (Ky.) 155.

89 Horner v. Speed, 2 Patt. & H.
 616.
 40 Pratt v. Russell, 61 Mass. 462;

Bennett v. Everett, 3. R. I. 152.

41 La Tourette v. Price, 28 Miss.

42 Dimock v. Revere Copper Co., 117 U. S. 559, 29 L. Ed. 994, affirming 90 N. Y. 33; Horner v. Speman, 78 III. 206; Seymour v. Browning, 17 Ohio, 362; Manwaring v. Kouns, 35 Tex. 171; Park v. Casey, 35 Tex. 536; Jenks v. Opp, 43 Ind. 108; Collins

No court except the bankruptcy court is bound to take notice of the discharge unless pleaded.<sup>47</sup> No proceeding in bankruptcy can be pleaded in bar of an action upon ante-bankruptcy debts except the discharge.<sup>48</sup>

A discharge may be pleaded by the bankrupt,<sup>49</sup> or by a person who has derived title from the bankrupt subsequent to his bankruptcy,<sup>50</sup> but not by other persons.<sup>51</sup> A discharge of two general partners can not be set up in favor of a special partner in an action against the three as general partners on the ground that the special partner has made himself liable as a general partner.<sup>52</sup> Where a bankrupt joins his sureties in pleading his discharge, if the plea is insufficient for them all, it is bad for all.<sup>53</sup>

v. McWalters, 72 N. Y. Suppl. 203, 35 Misc. 648, 6 Am. B. R. 593. If defendant fails to avail himself of right to have proceedings stayed pending bankruptcy, he can not thereafter plead his discharge. Pine Hill Coal Co. v. Harris, 7 Ky. L. Rep. 517. A discharge may be waived by failure to plead it till after yerdict where the discharge was obtained before suit was brought. Lane v. Holcomb, 182 Mass. 360, 65 N. E. 794. A discharge does not wholly extinguish a debt, but if properly pleaded, it merely furnishes a defense. Bank of Commence v. Elliott, 109 Wis. 648, 85 N. W. 417. A discharge in insolvency is of no avail unless properly pleaded. Griffith v. Adams, 95 Md. 170, 52 A. 66.

<sup>47</sup> Collins v. McWalters, 35 Misc. (N. Y.) 648, 72 N. Y. Suppl. 203, 6 Am. B. R. 593.

<sup>48</sup> Whitney v. Crafts, 10 Mass. 23; Lummins v. Fairfield, 5 Mass. 248; Chandler v. Winship, 6 Mass. 310; Atkinson v. Fortinberry, 15 Miss. 302; Hayes v. Flowers, 25 Miss. 169; Dick v. Powell, 2 Swan (Tenn.), 632; Ingalls v. Savage, 4 Pa. 224. In Nat. Bank v. Taylor, 120 Mass. 124, the defendant was allowed a continuance of the suit upon filing a copy of an adjudication until his right to a discharge should be determined by the court of bankruptcy.

49 Boynton v. Ball, 121 U. S. 457, 30 L. Ed. 985; Banque Franco-Egyptienne v. Brown, 24 Fed. Rep. 106; Ruiz v. Eickerman, 5 Fed. Rep. 790.

<sup>50</sup> Upshur v. Briscoe, 138 U. S. 365, 34 L. Ed. 931; Fleitas v. Mellen, 39 Fed. Rep. 129; Fleitas v. Richardson, 147 U. S. 550, 37 L. Ed. 272.

As to the effect of a discharge granted a *femme sole* who marries, see Chadwick v. Starrett, 27 Me. 138.

Moyer v. Dewey, 103 U. S. 301,
L. Ed. 304, as explained in Upshur v. Briscoe, 138 U. S. 378, 34
L. Ed. 931; Frazier v. Banks, 11
La. Ann. 31.

<sup>52</sup> Abendroth v. Van Dolson, 131
 U. S. 66, 33 L. Ed. 57.

58 Dyer v. Cleaveland, 18 Vt. 241; Hall v. Fowler, 6 Hill (N. Y.) 630. In what pleading, answer or plea, the defense of a discharge may be set up depends upon the practice relating to particular action and court in which it is pleaded.<sup>53\*</sup> A plea of discharge is sufficient if it sets out a discharge duly authenticated <sup>54</sup> with allegations which make it effective against the plaintiff.<sup>55</sup>

Thus the plea should show jurisdiction of the person and the subject-matter <sup>58</sup> that the claim was a provable debt, <sup>59</sup> created before the adjudication <sup>60</sup> and scheduled, or that the creditor had proper notice of it. <sup>68</sup>

<sup>68\*</sup> See Bryant v. Kingston, 127 Mich. 152, 86 N. W. 531.

The McNeill v. Knott, 11 Ga. 142; Rowan v. Holcombe, 16 Ohio, 463; Downer v. Chamberlin, 21 Vt. 414; Morrison v. Woolson, 23 N. H. 11; Preston v. Simons, 1 Rich. (S. Car.) 262; Lathrop v. Stuart, No. 8113 Fed. Cas. 5 McLean, 167; White v. How, No. 17549 Fed. Cas. 3 McLean, 291.

<sup>55</sup> Bailey's Admx. v. Gleason, 76 Vt. 115; Fowler v. Michael (Tex. Civ. App., June 1, 1904), 81 So. W. Rep. 321; Hathaway v. Masterson, 102 Ill. App. 626.

Plea of discharge must show that the demand in suit was not contracted after the adjudication. "Its essential requisites are that it must show: (1) Jurisdiction of the person and the subject-matter. (2) That the claim of the plaintiff was not exempted, and (3) that the discharge was granted." Fowler v. Michael (Texas, 1904), 81 S. W. 321.

An action for false imprisonment should set up not only the discharge but also such facts as show that the debt for which the plaintiff was arrested was covered by the discharge, and it is insufficient to merely plead the discharge. Bennett v. Lewis, 23 Ky. L. Rep. 2037, 66 S. W. 523.

58 Bailey v. Kraus, 39 Misc. (N. Y.) 845, 81 N. Y. Suppl. 492, 13 N. Y. Annot. Cas. 1, showing in which one of district courts discharge was granted; Fowler v. Michael (Tex. 1904), 81 S. W. 321.

In pleading a discharge in bankruptcy it is not necessary in Vermont to allege the facts that gave the court jurisdiction of the subject-matter or of the parties. Bailey v. Gleason, 76 Vt. 115, 56 A. 537.

<sup>59</sup> Where the declaration is on a promissory note and for money loaned, the plea in bankruptcy need not allege that the claim was provable, as it is *prima facie* provable. Bailey v. Gleason, 76 Vt. 115, 56 A. 537.

60 Fowler v. Michael (Tex. 1904), 81 S. W. 321.

A petition to determine the force / and effect of a discharge in bank-ruptcy must allege the date of the filing of the petition in bankruptcy. House v. Johnson, 19 Colo. App. 524, 76 P. 743.

63 Biela v. Urbanczyk, 38 Tex.
 Civ. App. 213, 85 S. W. 451;
 Bailey v. Gleason, 76 Vt. 115, 56

A certified copy of an order confirming a composition or granting a discharge, not revoked, is evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made.<sup>65</sup>

Where a discharge has been granted before the suit on the debt is commenced the plea of discharge should be set up in the first instance. The court will not permit it to be set up by amendment, unless a good excuse for omitting it is shown. Where a discharge is granted pending the suit the defense of discharge in bankruptcy is regularly permitted to be set up by amendment or supplemental answer or other proper pleading. It will not be allowed, however, where application to amend is not seasonably made, or where injustice would result. Where a discharge is granted after a judgment has been entered it is usually unavailing as a defense.

Where judgment is rendered on failure of the defendant to set up the discharge it will stand against attack in equity<sup>70</sup> and the court may refuse to set it aside,<sup>71</sup> although the discharge may be set up in proceedings to enforce the judgment.<sup>72</sup>

A. 537. The pleading setting up a discharge need not show that the creditor had notice as the burden is on the creditor to attack the discharge. Stevens v. King, 14 N. Y. App. Div. 377, 44, N. Y. Suppl. 893.

65 B. A. 1898, Sec. 21f; Boas v. Hetzel, 3 Pa. 298; Morse v. Cloyes, 11 Barb. (N. Y.) 100; Pennell v.

Percival, 13 Pa. 197.

66 Richards v. Nixon, 20 Pa. 19; Lyon v. Isett, 34 N. Y. Supp. 41; Holyoke v. Adams, 59 N. Y. 233; Fellows v. Hall, No. 4722 Fed. Cas., 3 McLean, 281; Kunzler v. Kohaus, 5 Hill (N. Y.), 317; Keene v. Mould, 16 Ohio, 12; Kane v. Casper, 51 N. Y. App. Div. 540, 64 N. Y. S. 838.

In Nat. Bank v. Taylor, 120 Mass. 124, the defendant filed an order of

adjudication in the state court and was permitted to have a continuance to await the determination of the question of whether he received a discharge.

67 Medbury v. Swan, 46 N. Y. 200; Barstow v. Hansen, 2 Hun. (N. Y. Supr.) 333.

Wyckoff v. Williams, 121 N.
 Y. Suppl. 189, 136 App Div. 495.

Olimock v. Revere, 117 U. S.
 29 L. Ed. 994; Wolf v. Stix,
 U. S. 541, 24 L. Ed. 640.

White v. Powell (Texas 1905),
 S. W. 836; Ballamy v. Woodson, 4 Ga. 175, 48 Am. Dec. 221.

71 St. Louis World Pub. Co. v. Rialto Grain Co., 108 Mo. App. 479, 83 S. W. 781; Snyder v. Guthrie, 17 Am. B. R. 902.

72 Hellman v. Goldstone (C. C. A.

In New York by statute a judgment may be set aside on account of the discharge.<sup>74</sup> Such a defense may be made in Tennessee by a bill in chancery after the decree of the supreme court, but not by the suggestion of the fact in that court. Such proceeding performs the office of a plea of discharge in bankruptcy and enforces the same rights.<sup>75</sup> Judgments by default have frequently been set aside to allow a plea of discharge.<sup>76</sup> An execution should not issue upon a judgment after the debtor has obtained a discharge.<sup>77</sup> If an execution is issued it may be perpetually stayed.<sup>78</sup>

Where a discharge is not granted until the case is in an appellate court it will not avail the defendant ordinarily as a defense, 79 because there is no way in which it can be brought before the court. It has been held, however, that

3d Cir.), 161 Fed. Rep. 913, 88 C. C. A. 604, 20 Am. B. R. 539.

Failure to make use of a state statute providing a means of canceling on the record judgments barred by the discharge does not prevent setting up the discharge as a bar to proceedings on the judgment. *In re* Peterson's Estate, 64 Misc. (N. Y.) 217, 118 N. Y. Suppl. 1077.

74 Walker v. Muir, 194 N. Y. 420, 21 Am. B. R. 593 (judgment entered after the discharge); Walker v. Muir, 21 Am. B. R. 278. (Failure of bankrupt to obtain a stay from bankruptcy court immaterial.) Hussey v. Judson, 11 Am. B. R. 521, although debtor has failed to plead the discharge.

<sup>75</sup> Wolf v. Stix, 99 U. S. 1, 25 L. Ed. 309, 96 U. S. 541, 24 L. Ed. 640.

76 Savings Bank v. Webster, 48 N. H. 21; Lee v. Phillips, 6 Hill (N. Y.) 246; Carter v. Goodrich, 1 How. Prac. (N. Y.) 239; Shurt-

leff v. Thompson, 63 Me. 118; Park v. Casey, 35 Tex. 536; Manwarring v. Kouns, 35 Tex. 171.

<sup>77</sup> Francis v. Ogden, 22 N. J. L. 210; Alcott v. Avery, 1 Barb. Chan. (N. Y.) 347; Hill v. Harding, 130 U. S. 699, 32 L. Ed. 1083; Wolf v. Stix, 99 U. S. 1, 25 L. Ed. 309.

78 Alcott v. Avery, 1 Barb. Chan. (N. Y.) 347; Thomas v. Shaw, 2 Cin. Sup. Ct. 97; Chambers v. Neal, 13 B. Mon. (Ky.) 256; McDougald v. Reid, 5 Ala. 810; Curtis v. Slosson, 6 Pa. 265; Graham v. Pierson, 6 Hill (N. Y.), 247; Stewart v. Hargrove, 23 Ala. 429; Bank v. Franciscus, 10 Mo. 27; Chamberlain v. Gurney, 1 How. Pr. (N. Y.) 238.

79 Wolf ,v. Stix, 99 U. S. 1, 25
L. Ed. 309; Wolf v. Stix, 96 U.
S. 541, 24 L. Ed. 640; Cornell v.
Dakin, 38 N. Y. 253; Riggs v.
White, 4 Heisk. (Tenn.) 503; Longley v. Swayne, 4 Heisk. (Tenn.) 506.

the appellate court might enter a judgment pro forma where a discharge was suggested.<sup>80</sup>

A plea of a discharge can be properly met by an amendment to the bill alleging that the lien sought to be enforced was four months old.<sup>81</sup>

#### § 803. Burden of proof.

The burden of the proof is upon the bankrupt to show that the debt of the plaintiff is within the class of debts as to which his discharge in bankruptcy operates as a release, 82 and to show that the claim was properly scheduled or that the creditor had actual knowledge of the proceedings. 85

## § 804. Revoking discharges.

The statute provides that "the judge may, upon the application of parties in interest who have not been guilty of un-

80 Bank v. Onion, 16 Vt. 470; Haggerty v. Morrison, 59 Mo. 324.

81 Brunson v. Rosenheim, 149 Ala.112, 43 S. 31.

82 Wineman v. Fisher, 135 Mich.
604; Imhoff v. Whittle (Tex. Civ. App., Nov. 2, 1904), 82 S. W. 1056,
84 S. W. 243; Baker v. Hughes, 5
Ga. App. 586, 63 S. E. 587; Sorden v. Gatewood, 1 Ind. 107.

The burden was held to be on creditor to show himself affected by the discharge in Van Norman v. Young, 228 III. 425, 81 N. E. 1060, affirmed, 129 Ill. App. 542; Alling v. Straka, App. 184; Gatliff 118 III. Mackey, 31 Ky. L. Rep. 947, 104 S. W. 379; Culver v. Torrey, 34 Misc. (N. Y.) 793, 69. N. Y. Suppl. 919; Meyer v. Bartels, 56 Misc. (N. Y.) 621, 107 N. Y. Suppl. 778; In re Peterson's Estate, 64 Misc. (N. Y.) 217, 118 N. Y. Suppl. Tompkins v. Williams, 122 N. Y. Suppl. 152; Ex parte Peterson, 77 Vt. 226, 59 A. 828. Under B. A. 1898, Sec. 21f it is presumed that the debts are properly scheduled, and the creditors had notice, and the burden is on the creditors to show that their debts are excepted from the discharge. In re Peterson, 121 N. Y. Suppl. 738, affirming 118 N. Y. Suppl. 1077. 64 Misc. 217.

Solvent Wineman v. Fisher, 135 Mich. 604, 98 N. W. 404, 10 Detroit Leg. N. 903; Armstrong v. Sweeney, 73 Neb. 775, 103 N. W. 436; Graber v. Gault, 103 N. Y. App. Div. 511, 93 N. Y. Suppl. 76.

The burden is upon one setting up a discharge to show not only that the debt in question was scheduled, but that it contained the true name of the holder or owner, or if not known that he exercised reasonable diligence to ascertain such name. Fields v. Rust, 36 Tex. Civ. App. 350, 82 S. W. 331. Weidenfeld v. Tillinghast, 18 Am. B. R. 531; contra, Lafoon v. Kerner, 138 N. C. 281, 50 S. E. 654.

due laches, filed at any time within one year after a discharge shall have been granted, revoke it upon a trial if it shall be made to appear that it was obtained through the fraud of the bankrupt, and that the knowledge of the fraud has come to the petitioners since the granting of the discharge, and that the actual facts did not warrant the discharge.<sup>89</sup>

This provision prescribes the form, the time within which and the grounds upon which direct proceedings to impeach a discharge may be had. The remedy thus given is exclusive, the application must be made to the court which granted the discharge. The discharge should be revoked where it appears that it covers only debts included in a former proceeding where the bankrupt failed to apply for his discharge within the time limited by the act. 90 A certified copy of the order granting a discharge, not revoked, is evidence of the jurisdiction of the court, the regularity of the proceeding, and of the fact that the order was made. 91

The application must be made by a party in interest. A creditor, whose name has been omitted from the schedule, and who has had no notice or knowledge of bankruptcy proceedings, or who has no provable claim, has not such an interest as will enable him to institute proceedings to vacate a discharge. The reason for this is that his debts are not affected by the discharge. The fact that a creditor is barred from proving his claim by Section 57n does not prevent him from being a party in interest. 93

<sup>89</sup> B. A. 1898, Sec. 15 and Sec. 2, clause 12.

Compare R. S. Sec. 5120. The act of 1841 provided that a discharge might be impeached in all courts of justice for certain causes and in the manner in the act stated. (Act of 1841, Sec. 4, 5 Stat. at L. 440.) Under the act of 1800 discharge might be impeached when pleaded as a defense. (Act of 1800, Sec. 34, 2 Stat. at L. 19.)

In re Griffin Bros., 154 Fed. 537, 19 Am. B. R. 78.

90 In re Levenstein, 180 Fed. Rep. 957, 24 Am. B. R. 822.

<sup>91</sup> B. A. 1898, Sec. 21f; Allen v. Thompson, 10 Fed. Rep. 116; In re Adams, 29 Fed. Rep. 843.

<sup>92</sup> B. A. 1898, Sec. 17, clause 3;
In re Monroe, 114 Fed. Rep. 398, 7
Am. B. R. 706; In re Chandler
(C. C. A. 7th Cir.), 138 Fed. Rep. 637, 14 Am. B. R. 512; Arrington
v. Arrington, 132 Fed. Rep. 200, 13
Am. B. R. 89.

93 In re Bimberg, 121 Fed. Rep.942, 9 Am. B. R. 601.

Members of a partnership discharged may be interested enough to have a right to open the discharge and amend the schedules to include an asset inadvertently omitted.<sup>94</sup>

The application must be filed within one year after the discharge has been granted, and by one who has not been guilty of undue laches. Where the petition is not filed within one year from the date of the discharge it is absolutely barred by the statute. The limitation is not in any way controlled by the discovery of the fraud. A person will not be permitted to amend his application after the expiration of one year from the date of the discharge by adding new grounds or acts.

What causes such laches on the part of the applicant as to prevent his making an application within a year from the granting of a discharge depends upon the circumstances of each case. 99 Mere averments by the creditor that he has not been guilty of laches are not sufficient. 100

<sup>94</sup> In re McKee et al., 165 Fed. 269, 21 Am. B. R. 306.

95 B. A. 1898, Sec. 15.

96 Mall v. Ullrich, 37 Fed. Rep. 653; Varey, et al., v. Jackson, 164 Fed. 840, 21 Am. B. R. 334 (5th Cir.), seven years later is too late.
97 Pickett v. McGavick, No. 11126 Fed. Cas., 14 N. B. R. 236; In re Brown, No. 1983 Fed. Cas., 19 N. B. R. 312.

98 In re Sims, 9 Fed. Rep. 440;
 In re Wright, 177 Fed. Rep. 578,
 24 Am. B. R. 437.

<sup>99</sup> In re Upson, 124 Fed. Rep. 980, 10 Am. B. R. 758; In re Murray, No. 9953 Fed. Cas., 14 Blatch. 43, five months was held an unreasonable delay under the circumstances of that case. See also In re Beck, 31 Fed. Rep. 554; In re Hunter, No. 6902 Fed. Cas., 3 McLean, 297.

In In re Dupee, No. 4183 Fed. Cas., 2 Low. 18, Judge Lowell re-

opened a decree of discharge where the date had been set for hearing an application for discharge upon specification of objections, and a discharge granted in the absence of the creditors, upon a showing that their counsel was unavoidably prevented from being present and from informing them in order that they might obtain a postponement.

In re McIntire, No. 8823 Fed. Cas., 2 Ben. 345, a specification of objections to a discharge had been filed, which was, however, too vague to be triable, and a discharge had been granted. An application one month afterward to have the case reopened, with leave to amend the specification, was denied on the ground of laches.

In re Mauzy, 163 Fed. 900, 21 Am. B. R. 59.

<sup>100</sup> In re Oleson, 110 Fed. Rep. 796, 7 Am. B. R. 22,

The application is made by petition, addressed to the judge and filed in the clerk's office, and not with the referee. It should state <sup>1</sup> the names and residences of the creditors and their interest in the matter; the date upon which the order of discharge was made; the particular acts complained of as fraudulent on the part of the bankrupt; that the knowledge of the fraud has come to the petitioners since the granting of the discharge; that the actual facts did not warrant a discharge; and pray that the discharge be annulled and set aside. The petition should be signed and verified <sup>2</sup> by the creditors or their authorized agent or attorney.

The procedure on such a petition is not prescribed by act or the general orders. The bankrupt should have reasonable notice of the filing of such petition in order to give him an opportunity to make a defense, if any he has. This he may do by demurrer if the petition is not sufficient in law. He should set up his defense on the merits in an answer or a plea. The time within which such pleading should be filed may be fixed by the judge. When an issue is made, the case is ripe for a hearing or trial. This may be had before the judge or a jury.<sup>3</sup> Evidence may be introduced by the petitioning creditors and by the bankrupt, and counsel heard for both parties.

The fact that a creditor can adduce new facts happening since the discharge, which would be competent evidence for a new trial, does not authorize a rehearing or a new trial upon specifications filed in opposition to the discharge of a bankrupt, heard and determined before the discharge.<sup>4</sup>

<sup>&</sup>lt;sup>1</sup> As to what a petition should contain, see *In re* Oliver, 133 Fed. Rep. 382, 13 Am. B. R. 582; *In re* Toothaker Bros., 128 Fed. Rep. 187, 12 Am. B. R. 99.

<sup>&</sup>lt;sup>2</sup> B. A. 1898, Sec. 18c.

<sup>&</sup>lt;sup>3</sup> B. A. 1898, Sec. 19c.

<sup>\*</sup>In re Corwin, 1 Fed. Rep. 847; In re McIntire, No. 8823 Fed. Cas., 2 Ben. 345.

But see In re Dupee, No. 4183 Fed. Cas., 2 Low. 18, where a case was reopened after discharge was granted,

There is only one ground specified in the statute upon which a discharge can be revoked; and that is, that the discharge "was obtained through the fraud of the bankrupt." <sup>5</sup>

The creditor has the right to have the discharge set aside when such fraud was used in obtaining it as would have prevented the granting of the discharge if it were known at the time. It may be doubted if constructive fraud is sufficient to maintain an application to revoke a discharge. It should be actual fraud as distinguished from fraud in law.

The courts have set aside decrees of discharge which were entered either through mistake or by default.<sup>8</sup> The discharge will not be set aside for want of notice where notice was given by publication.<sup>9</sup>

A discharge will not be vacated unless the court is satisfied that the creditor or his representatives had no knowledge of the objections at the time the discharge was granted.<sup>10</sup>

<sup>5</sup> B. A. 1898, Sec. 15.

In re Roosa, 119 Fed. Rep. 542,
9 Am. B. R. 531; Ex parte Briggs,
No. 1868 Fed. Cas., 2 Low. 389;
In re Rainsford, No. 11537 Fed.
Cas., 5 N. B. R. 381; In re Fowler,
No. 4999 Fed. Cas., 2 Low. 122;
In re Douglass, 11 Fed. Rep. 403.

In In re Augenstein, 2 MacArthur (D. C.), 322, the court said: "The fraud of the bankrupt in relation to his property is too clear for doubt or discussion. He is shown to have possessed considerable property, of which he gives no rational account, no assets came to the hands of the assignee, and his wife, when interrogated as to how she came to have a large sum of money, refused to give any explanation, The traces of fraud are apparent upon the slightest examination of the evidence, and little or nothing need be said upon the subject."

"It is not a fraud for the bank-rupt to apply to his use, certain commissions earned in the insurance business under an opinion of the referee that the bankrupt was entitled to these commissions, although subsequently the referee's decision is reversed, and a discharge of the bankrupt will not be revoked; on the ground of concealment of such assets. *In re* Wright, 177 Fed. Rep. 578, 24 Am. B. R. 437.

<sup>8</sup> In re Amory & Leeds, No. 336a Fed. Cas., Betts Scr. Bk. 97; In re Dupee, No. 4183 Fed. Cas., 2 Low. 18.

<sup>9</sup> In re Fritz, 173 Fed. Rep. 560, 23 Am. B. R. 84.

<sup>10</sup> B. A. 1898, Sec. 15; In re Bates, 27 Fed. Rep. 604; Marionneaux's Case, No. 9088 Fed. Cas.,
 <sup>1</sup> Woods, 37; In re Douglass, 11 Fed. Rep. 403.

Where an attorney has knowledge of objections it will be presumed that the client knows the same facts.<sup>11</sup>

If the court finds that the fraudulent acts alleged are not proved, or that they were known to the creditors before the granting of the discharge, the judgment should be rendered in favor of the bankrupt.<sup>12</sup> In such case the validity of his discharge is not affected by the proceedings. If the court finds that the fraudulent acts, or any of them, alleged by the creditor in his petition are proved, and that the creditor had no knowledge of the same until after the granting of the discharge, and that the actual facts would not warrant the discharge, the judgment should be given in favor of the creditor and the discharge of the bankrupt should be annulled.

The court may set aside the discharge of a trustee, which has inadvertently found its way into the files and order him to proceed.<sup>13</sup>

Costs may be awarded to the prevailing party in such a proceeding.<sup>14</sup>

A court of bankruptcy will not set aside a discharge to permit the bankrupt to amend his schedules by including an omitted creditor more than a year after the adjudication in bankruptcy.<sup>15</sup>

# § 805. The effect of revoking a discharge.

The effect of annulling an order granting a discharge renders the discharge invalid as a defense to actions upon debts of the bankrupt. Where it is pleaded, the order revoking it is a good answer to the plea. If the judgment of the court is in favor of the bankrupt the validity of his discharge is not affected by the proceedings to revoke it.

<sup>&</sup>lt;sup>11</sup> In re Douglass, 11 Fed. Rep. 403.

<sup>&</sup>lt;sup>12</sup> In re Hoover, 105 Fed. Rep. 354, 5 Am. B. R. 247.

<sup>&</sup>lt;sup>18</sup> Maybin v. Raymond, No. 9338 Fed. Cas., 15 N. B. R. 353.

<sup>&</sup>lt;sup>14</sup> In re Holgate, No. 6601 Fed. Cas., 8 Ben. 355.

 <sup>15</sup> In re Spicer, 145 Fed. Rep.
 431, 16 Am. B. R. 802; In re
 Hawk, 114 Fed. Rep. 916, 8 Am.
 B. R. 71.

The granting of a discharge is in no way dependent upon the settlement of the bankrupt's estate. 16

It may therefore be granted and revoked before the estate is settled and the original trustee discharged. Where this is the case a new trustee is not necessary. Otherwise the creditors of the bankrupt estate may, at their first meeting after a discharge has been revoked or if there is a vacancy in the office of trustee, appoint one trustee or three trustees of such estate. If the creditors do not appoint a trustee or trustees as herein provided the court should do so.<sup>17</sup>

Whenever a discharge is revoked, the trustee, upon his appointment and qualification, is vested with the title of all the property of the bankrupt as of the date of the final decree revoking the discharge.<sup>18</sup>

In the event of a discharge being revoked, the property acquired by the bankrupt, in addition to his estate at the time the adjudication was made, shall be applied to the payment in full of the claims of creditors for property sold to him on credit, in good faith, while such discharge was in force, and the residue, if any, is applied to the payment of the debts which were owing at the time of the adjudication.<sup>19</sup>

<sup>&</sup>lt;sup>16</sup> B. A. 1898, Sec. 14.

<sup>&</sup>lt;sup>17</sup> B. A. 1898, Sec. 44.

 <sup>&</sup>lt;sup>18</sup> B. A. 1898, Sec. 70d; McAlpine v. Tourtelotte, 24 Fed. Rep. 69.
 <sup>19</sup> B. A. 1898, Sec. 64c.

#### CHAPTER XXXVII.

## THE CIRCUIT COURT OF APPEALS.

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## § 806. Jurisdiction appellate only.

The jurisdiction of the circuit court of appeals is appellate only. It has no original jurisdiction in bankruptcy or law or equity.<sup>1</sup>

Its jurisdiction is limited to reviewing orders, judgments and decrees of the courts of bankruptcy, and the district courts in the exercise of the general jurisdiction conferred by the judicial code of 1911.<sup>2</sup>

<sup>1</sup> Whitney v. Dick, 202 U. S. 132, 137, 50 L. Ed. 963.

<sup>2</sup> B. A. 1898, Sec. 24a and Sec. 1, clause 3. Judicial Code of 1911, 36 Stat. at L. 1087, Secs. 130 to 135.

It has no jurisdiction to review the judgment of a state court,<sup>3</sup> or a circuit court in a case arising under the act of 1867.<sup>4</sup>

### § 807. Review of cases from territorial courts.

The circuit court of appeals, within whose jurisdiction a territorial court happens to be, is vested with jurisdiction to review by petition of revision, questions of law arising in the progress of bankruptcy proceedings in such territorial courts.<sup>1</sup>

The circuit court of appeals has no jurisdiction to review any case from a territorial court until the supreme court has made an order assigning the territory to a judicial circuit.<sup>2</sup>

The supreme court is vested with appellate jurisdiction of controversies arising in bankruptcy from a territorial court not within any organized circuit, and from the supreme court of the District of Columbia.<sup>3</sup> It has no jurisdiction to review the action of such courts in bankruptcy proceedings proper.<sup>4</sup> The time within which cases from these courts may be taken to the supreme court for review is governed by the general statutes and not by general order 36.<sup>5</sup>

Appeals in bankruptcy proceedings proper from the territorial courts lie to the supreme court of the territory.<sup>6</sup> Section 25 of the act provides that appeals, as in equity

<sup>8</sup> Terry v. Davey (C. C. A. 6th Cir.), 107 Fed. Rep. 50, 46 C. C. A. 141.

\*In re Sweetser (C. C. A. 1st Cir.), 186 Fed. Rep. 989, 108 C. C. A. 659.

<sup>1</sup> Plymouth Cordage Co. v. Smith, 194 U. S. 311, 48 L. Ed. 992.

<sup>2</sup> Ex parte Crawford (C. C. A. 8th Cir.), 152 Fed. Rep. 169, 81 C. C. A. 419, 18 Am. B. R. 258; Ex parte Wilder's Steamship Co., 183 U. S. 545, 46 L. Ed. 321; Royal Ins. Co. v. Martin, 192 U. S. 149, 160, 48 L. Ed. 385; Amado v. United States, 195 U. S. 172, 176, 49 L. Ed. 145.

<sup>3</sup> B. A. 1898, Sec. 24. Audubon v. Shufeldt, 181 U. S. 575, 45 L. Ed. 1009, 5 Am. B. R. 829; Armstrong v. Fernandez, 208 U. S. 324, 52 L. Ed. 514, 19 Am. B. Ř. 746; Tefft-Weller & Co. v. Munsuri, 222 U. S. 114; Munsuri v. Fricker, 222 U. S. 121, 55 L. Ed. —.

<sup>4</sup> Tefft-Weller & Co. v. Munsuri, 222 U. S. 114; Munsuri v. Fricker, 222 U. S. 121, 55 L. Ed. —.

<sup>5</sup> See Sec. 886, post.

<sup>6</sup> B. A. 1898, Sec. 25a. Plymouth Cordage Co. v. Smith, 194 U. S. 311, 48 L. Ed. 992. cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the supreme court of the territories in the following cases, to-wit (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over. No other orders or judgments in a bankruptcy proceeding are reviewable in the supreme court of the territory.<sup>7</sup>

Such appeal must be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be.<sup>8</sup> The appeal is allowed by a judge of the court appealed from or of the court appealed to, and is regulated, except as otherwise provided in the act, by the rules governing appeals in equity in the courts of the United States.<sup>9</sup>

Appeals and writs of error to review judgments and decrees in suits at law and in equity growing out of the settlement of bankrupt estates lie to the supreme court of the territories. The bankrupt act does not affect the jurisdiction of the territorial courts in controversies at law or in equity arising in bankruptcy proceedings. The review in such cases is governed by the laws of the territory regulating appeals and writs of error generally.

# § 808. Methods of review.

There are four methods of procedure by which an order, judgment or decree of a court of bankruptcy may be revised by a circuit court of appeals <sup>1</sup> with power to affirm, reverse or modify the same, as follows, to-wit:

<sup>&</sup>lt;sup>7</sup> Plymouth Cordage Co. v. Smith, 194 U. S. 311, 48 L. Ed. 992.

<sup>&</sup>lt;sup>8</sup> B. A. 1898, Sec. 25a. As to time for taking appeal, see Sec. 832, post.

<sup>9</sup> Gen. Ord. No. 36.

<sup>10</sup> B. A. 1898, Sec. 24a.

<sup>&</sup>lt;sup>1</sup> In re Mueller (C. C. A. 6th Cir.), 135 Fed. Rep. 711, 68 C. C. A. 349, 14 Am. B. R. 256; Burleigh v. Forman (C. C. A. 1st Cir.), 125 Fed. Rep. 217, 60 C. C. A. 109, 11 Am. B. R. 74.

First. A petition for revision. An order, judgment, or decree, final or interlocutory, in a proceeding in a court of bankruptcy, may be superintended and revised in matters of law on petition for review, by the circuit court of appeals.<sup>2</sup>

Second. An appeal in bankruptcy proceedings. A judgment in a bankruptcy proceeding proper, may be reviewed on appeal, as in equity, in three classes of cases only; namely, judgments adjudging or refusing to adjudge the defendant a bankrupt; granting or denying a discharge; and allowing or rejecting a claim of five hundred dollars or over.<sup>3</sup>

Third. A writ of error. A writ of error lies in bankruptcy proceedings, when an issue is tried by a jury as a matter of right; <sup>4</sup> and a writ of error lies to review a judgment in a suit at law arising out of the settlement of the estates of bankrupts.<sup>5</sup>

Fourth. An appeal to review a decree in equity arising out of the settlement of the estates of bankrupts.<sup>6</sup>

The circuit courts of appeals have generally held that the right of appeal and the right of revision by petition are exclusive of each other.<sup>7</sup> A different rule exists in the eighth

<sup>2</sup> B. A. 1898, Sec. 24b; see Sec. 810, et seq., post.

<sup>3</sup> B. A. 1898, Sec. 25a; see Sec. 822, et seq., post.

<sup>4</sup> Sec. 830, post; Grant Shoe Co. v. Laird, 203 U. S. 502, 51 L. Ed. 292, 17 Am. B. R. 1; Elliott v. Toeppner, 187 U. S. 327, 47 L. Ed. 200, 9 Am. B. R. 50; Ins. Co. v. Comstock, 16 Wall. 258, 21 L. Ed. 493.

<sup>6</sup> B. A. 1898, Sec. 24a. Sec. 6 of the Act of March 3, 1891, 26 Stat. at L. 826.

<sup>5</sup> B. A. 1898, Sec. 24a; Sec. 6 of the Act of March 3, 1891, 26 Stat. at L. 826; Hewit v. Berlin Machine Works, 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709; Mason v. Wolkowich (C. C. A. 1st Cir.), 150 Fed. Rep. 699, 80 C. C. A. 435, 17 Am. B. R. 709; Thomas v. Woods (C. C. A. 8th Cir.), 173 Fed. Rep. 585, 97 C. C. A. 535, 23 Am. B. R. 132.

<sup>7</sup> In re Worcester County (C. C. A. 1st Cir.), 102 Fed. Rep. 808, 42 C. C. A. 637, 4 Am. B. R. 496; In re Mertens (C. C. A. 2d Cir.), 142 Fed. Rep. 445, 73 C. C. A. 561, 15 Am. B. R. 701; In re Kuffler (C. C. A. 2d Cir.), 127 Fed Rep. 125, 61 C. C. A. 259, 11 Am. B. R. 469; Doroshow v. Ott (C. C. A. 3d Cir.), 134 Fed. Rep. 740, 67 C. C. A. 644, 14 Am. B. R. 34; Cook Inlet Coal Fields Co. v. Caldwell (C. C. A. 4th Cir.), 147 Fed. Rep. 475, 78 C. C. A. 17, 17 Am. B. R. 135; In re Abraham (C. C. A. 5th Cir.), 93 Fed. Rep. 767, 784, 35 C. C. A. 592. 2 Am. B. R. 266; Liddon & Bro. v. Smith (C. C. A. 5th Cir.), 135 Fed. Rep. 43, 67 C. C. A. 517, 14 Am. B. R. 204; Schuler v. Hassinger (C. C. A. 5th Cir.), 177 Fed. Rep. 119, 100 C. C. A. 539, 24 Am. B. R. circuit, where these provisions are held to be cumulative and not exclusive of each other.<sup>8</sup> In that circuit the parties aggrieved in many cases have the option to present the questions of law by petition for revision and questions of law and fact by an appeal.

The supreme court has not expressly decided whether the right of appeal and the right of revision by petition are cumulative or exclusive of each other.<sup>8\*</sup> That court has often referred to the distinction between steps in bankruptcy proceedings proper, and controversies arising out of the settlement of the estates of bankrupts as recognized in Sections 23, 24 and 25, of the bankruptcy act,<sup>9</sup> and has said: "The provisions as to revisions in matters of law and appeals were

184; In re Mueller (C. C. A. 6th Cir.), 135 Fed. Rep. 711, 68 C. C. A. 349, 14 Am. B. R. 256; In re First Nat. Bank (C. C. A. 6th Cir.), 135 Fed. Rep. 62, 67 C. C. A. 536, 14 Am. B. R. 180; In re Friend (C. C. A. 7th Cir.), 134 Fed. Rep. 778, 67 C. C. A. 500, 13 Am. B. R. 595; In re Good (C. C. A. 8th Cir.), 99 Fed. Rep. 389, 39 C. C. A. 581, 3 Am. B. R. 605.

This last case is overruled *In re* McKenzie (C. C. A. 8th Cir.), 142 Fed. Rep. 383, 73 C. C. A. 483, 15 Am. B. R. 679, and *In re* Holmes (C. C. A. 8th Cir.), 142 Fed. Rep. 391, 73 C. C. A. 491, 15 Am. B. R. 689,

<sup>8</sup> In re McKenzie (C. C. A. 8th Cir.), 142 Fed. Rep. 383, 73 C. C. A. 483, 15 Am. B. R. 679; In re Holmes (C. C. A. 8th Cir.), 142 Fed. Rep. 391, 73 C. C. A. 491, 15 Am. B. R. 689.

See also Burleigh v. Foreman (C. C. A. 1st Cir.), 125 Fed. Rep. 217, 60 C. C. A. 109, 11 Am. B. R. 74.

\*\*This question was certified to the supreme court by the circuit court of appeals for the sixth circuit in the matter of H. H. Loving, trustee of the Starks-Ullman Saddlery Co., on February 10, 1910.

Consult Tefft-Weller & Co., 222 U. S. 114; Coder v. Arts, 213 U. S. 223, 53 L. Ed. 772, 22 Am. B. R. 1.

9 First Nat. Bank v. Klug, 186 U. S. 202, 46 L. Ed. 1127, 8 Am. B. R. 12; Elliott v. Toeppner, 187 U. S. 327, 333-4, 47 L. Ed. 200, 9 Am. B. R. 50; Hewit v. Berlin Mach. Wks., 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709; Plymouth Cordage Co. v. Smith, 194 U. S. 311, 48 L. Ed. 992; Hutchinson v. Otis, 190 U. S. 552, 47 L. Ed. 1179, 10 Am. B. R. 135; First Nat. Bank v. Title & Trust Co., 198 U. S. 280, 49 L. Ed. 1051, 14 Am. B. R. 102; Louisville Trust Co. v. Comingor, 184 U. S. 18, 46 L. Ed. 413, 7 Am. B. R. 421; Grant Shoe Co. v. Laird, 203 U. S. 502, 51 L. Ed. 292, 17 Am. B. R. 1.

framed and must be construed in view of that distinction." <sup>10</sup> In *Hewit* v. *Berlin Machine Works* <sup>11</sup> that court has said: "Section 25a relates to appeals from judgments in certain enumerated steps in bankruptcy proceedings, in respect of which special provision therefor was required, while Section 24a relates to controversies arising in bankruptcy proceedings in the exercise by the bankruptcy courts of the jurisdiction, vested in them at law and in equity by Section 2, to settle the estates of bankrupts and to determine controversies in relation thereto."

In other cases it has been held that where a decision is not open to revision by appeal or writ of error under either of these sections, it might be reviewed on petition for revision under Section  $24b.^{12}$  This was the only method of reviewing the action of the court of bankruptcy in these cases, because they did not fall within the provisions regulating appeals either in bankruptcy proceedings proper or controversies arising in bankruptcy.

It has also been held that the rulings of a court in the progress of a trial by jury can only be reviewed on writ of error. 18

<sup>10</sup> Holden v. Stratton, 191 U. S.
 115. 48 L. Ed. 116, 10 Am. B. R.
 786.

<sup>11</sup> 194 U. S. 296, 300, 48 L. Ed. 986, 11 Am. B. R. 709.

12 Louisville Trust Co. v. Comingor, 184 U. S. 18, 46 L. Ed. 413, 7
Am. B. R. 421; Schweer v. Brown, 195 U. S. 172, 49 L. Ed. 144, 12 Am. B. R. 673; Holden v. Stratton, 191 U. S. 115, 48 L. Ed. 116, 10 Am. B. R. 786.

In First Nat. Bank v. Trust Co., 198 U. S. 291, 49 L. Ed. 1051, 14 Am. B. R. 102, it was said: "And in any view, the proceeding was a proceeding in bankruptcy. Being such, an appeal from the decree of the district court under Section 25a did not lie, and the parties aggrieved

could only invoke the supervisory power under Section 24b."

In Bryan v. Bernheimer, 181 U. S. 188, 45 L. Ed. 814, 5 Am. B. R. 523, an appeal was treated as a petition for revision by the circuit court of appeals for the fifth circuit (*In re* Abraham, 93 Fed. Rep. 767, 784, 2 Am. B. R. 266), and the supreme court considered the decree as rendered in the exercise of the supervisory power in that case. See Holden v. Stratton, 191 U. S. 115, 119, 48 L. Ed. 116, 10 Am. B. R. 786.

18 Grant Shoe Co. v. Laird, 203
U. S. 502, 51 L. Ed. 292, 17 Am.
B. R. 1; Elliott v. Toeppner, 187
U. S. 327, 47 L. Ed. 200, 9 Am. B.

## § 809. Two forms of proceeding in the same case.

It is sometimes hard to determine which form of proceeding to employ. When the moving party is uncertain as to the nature of his remedy he may, out of abundant caution and to guard against a possible chance of dismissal, take the case to the appellate court in several ways. This is frequently done. In such cases the appellate court will select the proper proceeding and dismiss the others.<sup>1</sup>

It has become common practice in doubtful cases to take an appeal and file a petition for revision in the same case.<sup>2</sup> In some cases an appeal has been treated as a petition for review, when only a question of law was presented by the appeal,<sup>3</sup> but this will not be done where questions of fact and law are both involved in the appeal.<sup>4</sup> If these remedies

R. 50; Ins. Co. v. Comstock, 16 Wall. 258, 21 L. Ed. 493.

<sup>1</sup> Lockman v. Lang (C. C. A. 8th Cir.), 132 Fed. Rep. 1, 65 C. C. A. 621, 12 Am. B. R. 497; Mason v. Wolkowich (C. C. A. 1st Cir.), 150 Fed. Rep. 699, 80 C. C. A. 435, 17 Am. B. R. 709.

In Hearst v. Hollingsworth, 94 U. S. 111, 24 L. Ed. 31, in denying a motion to dismiss a writ of error and appeal in the same case the supreme court said: "He has but one case, and, when we come to examine it, we will determine whether it is properly here by appeal or writ of error and will proceed accordingly."

<sup>2</sup> In re Worcester County (C. C. A. 1st Cir.), 102 Fed. Rep. 808, 42 C. C. A. 637, 4 Am. B. R. 496; Fisher v. Cushman (C. C. A. 1st Cir.), 103 Fed. Rep. 860, 43 C. C. A. 381, 4 Am. B. R. 646; In re Dickson (C. C. A. 1st Cir.), 111 Fed. Rep. 726, 49 C. C. A. 574, 7 Am. B. R. 186; Hutchinson v. LeRoy (C. C. A. 1st Cir.), 113 Fed. Rep.

202, 51 C. C. A. 159, 8 Am. B. R. 20; In re Holmes (C. C. A. 8th Cir.), 142 Fed. Rep. 391, 73 C. C. A. 491, 15 Am. B. R. 689; Schuler v. Hassinger (C. C. A. 5th Cir.), 177 Fed. Rep. 119, 100 C. C. A. 539, 24 Am. B. R. 184.

<sup>3</sup> Chesapeake Shoe Co. v. Seldner (C. C. A. 4th Cir.), 122 Fed. Rep. 593, 58 C. C. A. 261, 10 Am. B. R. 466; *In re* Russell (C. C. A. 2d Cir.), 101 Fed. Rep. 248, 41 C. C. A. 323, 3 Am. B. R. 658.

In Bryan v. Bernheimer, 181 U. S. 188, 45 L. Ed. 814, 5 Am. B. R. 523, an appeal was treated as a petition for revision by the circuit court of appeals for the fifth circuit (*In re* Abraham, 93 Fed. Rep. 767, 784, 2 Am. B. R. 266), and the supreme court considered the decree as rendered in the exercise of the supervisory power in that case. See Holden v. Stratton, 191 U. S. 115, 119, 48 L. Ed. 116, 10 Am. B. R. 786.

<sup>4</sup> In re Whitener (C. C. A. 5th Cir.), 105 Fed. Rep. 180, 44 C. C. A.

are exclusive of each other "there is no more reason for treating an appeal as a petition for review than there would be for treating an appeal as a writ of error or vice versa." <sup>5</sup>

A writ of error and an appeal have been prosecuted from an adjudication in bankruptcy.<sup>6</sup> In some cases it is necessary to do so. If there were a jury trial with judgment on the verdict it must be reviewed on writ of error.<sup>7</sup> Where other issues are involved the order adjudging or refusing to adjudge the defendant a bankrupt is reviewable by appeal.<sup>8</sup>

An appeal, writ of error and petition for review may be prosecuted in the same case.9

Although several forms of appellate proceedings are employed to review one action in the court below, they constitute but one case in the appellate court. One record is sufficient and it is necessary to docket the case but once. This is the practice in the supreme court and the circuit courts of appeals where two proceedings are taken in the same case.<sup>10</sup>

## § 810. Revisory jurisdiction on petition.

The several circuit courts of appeals have jurisdiction in equity, either interlocutory or final, to superintend and revise

434, 5 Am. B. R. 198; Dickas v. Barnes (C. C. A. 6th Cir.), 140 Fed. Rep. 849, 72 C. C. A. 261, 15 Am. B. R. 566; Davidson v. Friedman (C. C. A. 6th Cir.), 140 Fed. Rep. 853, 72 C. C. A. 553, 15 Am. B. R. 489.

<sup>5</sup> Davidson v. Friedman (C. C. A. 6th Cir.), 140 Fed. Rep. 853, 72 C. C. A. 553, 15 Am. B. R. 489.

<sup>6</sup> Lockman v. Lang (C. C. A. 8th Cir.), 132 Fed. Rep. 1, 65 C. C. A. 621, 12 Am. B. R. 497; Cummins Grocer Co. v. Talley (C. C. A. 6th Cir.), 187 Fed. Rep. 507, 109 C. C. A. —, 26 Am. B. R. 484.

<sup>7</sup> Elliott v. Toeppner, 187 U. S. 327, 47 L. Ed. 200, 9 Am. B. R. 50; Grant Shoe Co. v. Laird, 203 U. S. 502, 51 L. Ed. 292, 17 Am. B. R. 1.

<sup>8</sup> B. A. 1898, Sec. 25a. In Cummins Grocer Co. v. Talley (C. C. A. 6th Cir.), 187 Fed. Rep. 507, 109 C. C. A. —, 26 Am. B. R. 484, this practice was followed and the court decided the case both on appeal and writ of error.

<sup>9</sup> This was done in Brown v. Detroit Trust Co., No. 2162 in the circuit court of appeals for the sixth circuit (1912).

<sup>10</sup> One case was docketed in the supreme court in Farrell v. O'Brien, 199 U. S. 89, 101, 50 L. Ed. 101; Security Trust Co. v. Dent, 187 U. S. 237, 47 L. Ed. 158; Montana Min. Co. v. St. Louis Min. etc., Co., 204 U. S. 204, 51 L. Ed. 444.

in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction.<sup>1</sup> A similar power was conferred upon circuit courts by the act of 1867 <sup>2</sup> and by the act of 1841.<sup>3</sup>

A circuit court of appeals has power to revise, as to matters of law under Section 24b the decision of a territorial court which happens to be within its jurisdiction,<sup>4</sup> but not when the territory has not been assigned to a judicial circuit.<sup>5</sup>

The provision of the present statute confers a complete supervision in matters of law over all the proceedings of the court of bankruptcy within the limits specified. It extends not only to all cases, but to all questions arising under the statute; in other words, the circuit court of appeals may review the whole case after a final decree and decide upon it, or it may assume jurisdiction of any particular proceeding or order arising in the progress of the case.<sup>6</sup> The power is expressly extended to "interlocutory or final" orders or decrees.

It may be said, generally, that a petition for revision will lie to review any order of a court of bankruptcy, not appealable, made in a summary proceeding in bankruptcy.<sup>7</sup> This is true even where the court of bankruptcy was without jurisdiction of the summary proceeding, because the relief sought

Davidson & Co. v. Friedman (C. C. A. 6th Cir.), 140 Fed. Rep. 853, 72 C. C. A. 553, 15 Am. B. R. 489; Schuler v. Hassinger (C. C. A. 5th Cir.), 177 Fed. Rep. 119, 123, 100 C. C. A. 539, 24 Am. B. R. 184; Dickas v. Barnes (C. C. A. 6th Cir.), 140 Fed. Rep. 849, 72 C. C. A. 261, 15 Am. B. R. 566; *In re* Strobel (C. C. A. 2d Cir.), 160 Fed. Rep. 916, 88 C. C. A. 98, 20 Am. B. R. 22.

Consult also the cases cited in the last of this section, illustrating some of the orders reviewed on petition for revision.

<sup>&</sup>lt;sup>1</sup> B. A. 1898, Sec. 24b.

<sup>&</sup>lt;sup>2</sup> R. S. Sec. 4986.

<sup>3 5</sup> Stat. at L. 440, Sec. 6.

<sup>&</sup>lt;sup>4</sup> Plymouth Cordage Co. v. Smith, 194 U. S. 311, 48 L. Ed. 992.

<sup>&</sup>lt;sup>5</sup> Ex parte Crawford (C. C. A. 8th Cir.), 152 Fed. Rep. 169, 81 C. C. A. 419, 18 Am. B. R. 258; see Sec. 807, ante.

<sup>&</sup>lt;sup>6</sup> Cook Inlet-Coal Fields Co. v. Caldwell (C. C. A. 4th Cir.), 147 Fed. Rep. 475, 479, 78 C. C. A. 17, 17 Am. B. R. 135.

<sup>First Nat. Bank v. Chicago Title
Trust Co., 198 U. S. 280, 291, 49
L. Ed. 1051, 14 Am. B. R. 102;</sup> 

could only be had in a plenary action.<sup>8</sup> The reason is that the object and character of the proceeding in the court of bankruptcy determines the question of the method of review.<sup>9</sup>

A petition will not lie to review a judgment appealable under Section 25a, <sup>10</sup> or controversies arising in bankruptcy proceedings, <sup>11</sup> or rulings made in a jury trial. <sup>12</sup>

The revisory jurisdiction does not include a review of orders made by a referee.<sup>18</sup> To review an order of a referee a certificate must be taken from the referee to the district judge and the matter passed upon by him. This order may then be reviewed by a circuit court of appeals.<sup>14</sup>

The revisory power is not to be exercised by the appellate court until after the action of the court of bankruptcy. The power to superintend and revise extends only to questions

8 Louisville Trust Co. v. Comingor, 184 U. S. 18, 46 L. Ed. 413,
7 Am. B. R. 421; First Nat. Bank v. Chicago Title & Trust Co., 198 U. S. 280, 291, 49 L. Ed. 1051, 14 Am. B. R. 102; Schweer v. Brown, 195 U. S. 171, 49 L. Ed. 144.

9 Coder v. Arts, 213 U. S. 223, 233, 53 L. Ed. 772, 22 Am. B. R. 1. In re Farrell (C. C. A. 6th Cir.), 176 Fed. Rep. 505, 100 C. C. A. 63, 23 Am. B. R. 826, Judge Warrington speaking for the court said: "Thus the remedy for coming into this court upon complaint made against allowance or refusal of a summary order is, we think, reducible to petition to revise in matter of law according to subdivision 'b,' Sec. 24, of the bankruptcy act. Nothing, as it seems to us, can be regarded as a controversy 'arising in bankruptcy proceedings' within the purview of subdivision 'a,' Sec. 24, where the subject-matter and object of the proceedings are within the power to make a summary order. Certainly this is true where plenary action is not sought. It is hardly necessary to say that complaint in regard to a summary order to turn over assets is not specially made appealable under subdivision 'a,' of section 25. In determining the question of remedy, then, as between review or appeal under the bankruptcy act, we are not to be governed by our ideas of whether the power invoked can be rightly exercised or not in the given instance, but by the object and character of the proceeding."

<sup>10</sup> See Sec. 811, post.

<sup>11</sup> See Sec. 812, post.

12 See Sec. 830 post. Elliott v. Toeppner, 187 U. S. 329, 47 L. Ed. 200, 9 Am. B. R. 50; Grant Shoe Co. v. Laird, 203 U. S. 502, 51 L. Ed. 292, 17 Am. B. R. 1.
13 In re Pettingill & Co. (C. C. A. 1st Cir.), 137 Fed. Rep. 840, 70 C. C. A. 338, 14 Am. B. R. 757.

14 As was done in Mueller v. Nugent, 184 U. S. 1, 46 L. Ed. 405,
7 Am. B. R. 224; Louisville Trust Co. v. Comingor, 184 U. S. 18. 46 L. Ed. 413, 7 Am. B. R. 421.

and matters which have been fairly presented to and passed upon by the court of bankruptcy. The exercise of such revisory power does not operate to transfer the entire proceedings into the circuit court of appeals, to be there continued as in a court of the first instance. Its jurisdiction is appellate and not original. Where the decree or order is affirmed, it stands as a decree or order of the court of bankruptcy, and is to be carried into due execution by that court.

In the exercise of the revisory jurisdiction under Section 24b, the circuit court of appeals have reviewed an order of a court of bankruptcy, giving or refusing priority of claims irrespective of the value, 16 or with reference to claims for exemptions, 17 or refusing to stay proceedings in a state court, 18 or to vacate and set aside an order setting aside a discharge and to reinstate the discharge, 19 or refusing to enjoin the bankrupt from prosecuting a second application for his discharge, 20 or refusing to reconsider a decision allowing

15 Godshalk Co. v. Sterling (C. C. A. 3d Cir.), 129 Fed. Rep. 580, 64 C. C. A. 148, 12 Am. B. R. 302; In re Shoe & Leather Reporter (C. C. A. 1st Cir.), 129 Fed. Rep. 588, 64 C. C. A. 156, 12 Am. B. R. 248.

16 In re Rouse, Hazard & Co. (C. C. A. 7th Cir.), 91 Fed. Rep. 96,
33 C. C. A. 356, 1 Am. B. R. 234.
See also Morgan v. First Nat. Bank
(C. C. A. 4th Cir.), 145 Fed. Rep. 466, 76 C. C. A. 236, 16 Am. B. R. 639.

<sup>17</sup> Bashinski v. Talbott (C. C. A.
5th Cir.), 119 Fed. Rep. 337, 56 C.
C. A. 241, 9 Am. B. R. 513; In re
Irvin (C. C. A. 8th Cir.), 120 Fed.
Rep. 733, 57 C. C. A. 147, 9 Am. B.
R. 689; White v. Thompson (C. C.
A. 5th Cir.), 119 Fed. Rep. 868, 56
C. C. A. 398, 9 Am. B. R. 653; In re Holden (C. C. A. 9th Cir.), 113
Fed. Rep. 141, 51 C. C. A. 97, 7

Am. B. R. 615; Steiner v. Marshall (C. C. A. 4th Cir.), 140 Fed. Rep. 710, 72 C. C. A. 103, 15 Am. B. R. 486; *In re* Youngstrom (C. C. A. 8th Cir.), 153 Fed. Rep. 98, 82 C. C. A. 232, 18 Am. B. R. 572.

18 In re Kanter & Cohen (C. C. A. 2d Cir.), 121 Fed. Rep. 984, 58
C. C. A. 260, 9 Am. B. R. 372; In re Seebold (C. C. A. 5th Cir.), 105
Fed. Rep. 910, 45 C. C. A. 117, 5
Am. B. R. 358; White v. Thompson (C. C. A. 5th Cir.), 119 Fed.
Rep. 868, 56 C. C. A. 398, 9 Am. B.
R. 653; In re San Gabriel Sanitorium Co. (C. C. A. 9th Cir.), 111
Fed. Rep. 892, 50 C. C. A. 56, 7 Am.
B. R. 206.

19 In re Hawk (C. C. A. 8th Cir.),114 Fed. Rep. 916, 52 C. C. A. 536,8 Am. B. R. 71.

20 In re Feigenbaum (C. C. A.
 2d Cir.), 121 Fed. Rep. 69, 57 C. C.
 A. 409, 9 Am. B. R. 595.

claims and for the recovery of dividends,21 or to sell the property of an adverse claimant,22 or refusing to allow a creditor, to amend his specification in opposition to a bankrupt's discharge,28 or that a party to a bankruptcy proceeding is guilty of contempt in refusing to obey an order of the court,24 or directing the trustee to return certain property to persons claiming it, which property was claimed by the trustee to be a part of the bankrupt's estate,25 or directing a payment to the trustee in bankruptcy of a sum of money,26 or allowing an amendment to an involuntary petition,27 or directing an officer of the court to take possession of the bankrupt's property including that which was found in the custody of a third party and was claimed adversely,28 or determining whether a preference must be surrendered or not before proving claim,29 or determining conflicting claims to property in the possession of a court of

<sup>21</sup> In re Lewensohn (C. C. A. 2d Cir.), 121 Fed. Rep. 538, 57 C. C. A. 600, 9 Am. B. R. 368.

<sup>22</sup> Beach v. Macon Grocery Co. (C. C. A. 5th Cir.), 120 Fed. Rep. 736, 52 C. C. A. 150, 9 Am. B. R. 762. See also Sturgiss v. Corbin (C. C. A. 4th Cir.), 141 Fed. Rep. 1, 72 C. C. A. 179, 15 Am. B. R. 543; *In re* McMahon (C. C. A. 6th Cir.), 147 Fed. Rep. 685, 77 C. C. A. 668, 17 Am. B. R. 530.

<sup>23</sup> In re Carley (C. C. A. 3d Cir.), 117 Fed. Rep. 130, 55 C. C. A. 146, 8 Am. B. R. 720; Kentucky Nat. Bank v. Carley (C. C. A. 3d Cir.), 121 Fed. Rep. 822, 58 C. C. A. 158, 10 Am. B. R. 375.

<sup>24</sup> See Sec. 868, ante. Carling v.
Seymour Lumber Co. (C. C. A. 5th Cir.), 113 Fed. Rep. 483, 51 C., C.
A. 1, 8 Am. B. R. 29; Mueller v.
Nugent, 184 U. S. 1, 46 L. Ed. 405,
7 Am. B. R. 224; Louisville Trust

Co. v. Comingor, 184 U. S. 18, 46 L. Ed. 413, 7 Am. B. R. 421.

25 In re Garcewich (C. C. A. 2d
 Cir.), 115 Fed. Rep. 87, 53 C. C. A.
 510, 8 Am. B. R. 149.

<sup>26</sup> Hutchinson v. LeRoy (C. C. A.
1st Cir.), 113 Fed. Rep. 202, 51 C.
C. A. 159, 8 Am. B. R. 20.

<sup>27</sup> In re Sears (C. C. A. 2d Cir.), 117 Fed. Rep. 294, 54 C. C. A. 532, 8 Am. B. R. 713; In re Carley (C. C. A. 3d Cir.), 117 Fed. Rep. 130, 55 C. C. A. 146, 8 Am. B. R. 720; Goodman v. Curtis (C. C. A. 5th Cir.), 174 Fed. Rep. 644, 99 C. C. A. 398, 23 Am. B. R. 504.

<sup>28</sup> In re Young (C. C. A. 8th Cir.), 111 Fed. Rep. 158, 49 C. C. A. 283, 7 Am. B. R. 14.

<sup>29</sup> In re Dickson (C. C. A. 1st Cir.), 111 Fed. Rep. 726, 49 C. C. A. 574, 7 Am. B. R. 186; In re Abraham Steers Lumber Co. (C. C. A. 2d Cir.), 112 Fed. Rep. 406, 50 C. C. A. 310, 7 Am. B. R. 332.

bankruptcy,<sup>30</sup> or ascertaining and liquidating liens,<sup>31</sup> or to enjoin execution in a state court against a trustee,<sup>32</sup> or to set aside an order of dismissal and to reinstate an involuntary petition,<sup>33</sup> or sustaining demurrer to petition filed for the purpose of vacating an adjudication in bankruptcy,<sup>34</sup> or to sell property of the bankrupt free from liens,<sup>35</sup> or confirming a sale of the bankrupt's property,<sup>35\*</sup> or requiring the bankrupt or other person to surrender to the trustee property alleged to be in his possession belonging to the estate in bankruptcy,<sup>36</sup> or as to the vacating of an adjudication upon a judgment lien under Section 67f,<sup>37</sup> or requiring the surrender of property by an assignee for the benefit of creditors,<sup>38</sup> or requiring a bankrupt to endorse a liquor license for sale,<sup>39</sup> or to remove a trustee,<sup>40</sup> or with reference to the extradition

30 In re Lemmon & Gale Co. (C.
C. A. 6th Cir.), 112 Fed. Rep. 296,
50 C. C. A. 247, 7 Am. B. R. 291;
Morgan v. First Nat. Bank (C. C.
A. 4th Cir.), 145 Fed. Rep. 466, 76
C. C. A. 236, 16 Am. B. R. 639.

<sup>81</sup> In re Shirley (C. C. A. 6th Cir.), 112 Fed. Rep. 301, 50 C. C. A. 252, 7 Am. B. R. 299; In re Pekin Plow Co. (C. C. A. 8th Cir.), 112 Fed. Rep. 308, 50 C. C. A. 257, 7 Am. B. R. 369; In re Beaver Coal Co. (C. C. A. 9th Cir.), 113 Fed. Rep. 889, 51 C. C. A. 519, 7 Am. B. R. 542.

<sup>32</sup> In re Neely (C. C. A. 2d Cir.),
113 Fed. Rep. 210, 51 C. C. A. 167,
7 Am. B. R. 312.

<sup>33</sup> In re Jemison Mercantile Co. (C. C. A. 5th Cir.), 112 Fed. Rep. 966, 50 C. C. A. 641, 7 Am. B. R. 588.

34 In re Ives (C. C. A. 6th Cir.),
113 Fed. Rep. 911, 51 C. C. A. 541,
7 Am. B. R. 692.

<sup>35</sup> In re Union Trust Co. (C. C. A. 1st Cir.), 122 Fed. Rep. 937, 59

C. C. A. 461, 9 Am. B. R. 767; In re Utt (C. C. A. 7th Cir.), 105 Fed. Rep. 754, 45 C. C. A. 32, 5 Am. B. R. 383.

Schuler v. Hassinger (C. C.
 A. 5th Cir.), 177 Fed. Rep. 119, 100
 C. C. A. 539, 24 Am. B. R. 184.

36 Mueller v. Nugent. 184 U. S. 1,
46 L. Ed. 405, 7 Am. B. R. 224;
Louisville Trust Co. v. Comingor,
184 U. S. 18, 46 L. Ed. 413, 7 Am.
B. R. 421; In re Purvine, 96 Fed.
Rep. 192, 2 Am. B. R. 787.

<sup>87</sup> In re Richards, 96 Fed. Rep.
935, 3 Am. B. R. 145; In re Beaver
Coal Co., 113 Fed. Rep. 889, 51 C.
C. A. 519, 7 Am. B. R. 542.

38 In re Gutwillig, 92 Fed. Rep. 337, 1 Am. B. R. 388; Davis v. Bohle, 92 Fed. Rep. 325, 1 Am. B. R. 412; In re Abraham, 93 Fed. Rep. 767, 2 Am. B. R. 266.

<sup>39</sup> In re Fisher, 103 Fed. Rep. 860,
 4 Am. B. R. 646.

40 In re Perkins, No. 10982 Fed. Cas., 5 Biss. 254. of bankrupt,<sup>41</sup> or appointing trustee when creditors fail to elect one,<sup>42</sup> or an order removing a proceeding in involuntary bankruptcy to another district.<sup>43</sup>

# § 811. Questions of law only reviewable on petition.

A petition for revision does not operate to transfer the entire proceedings into the circuit of appeals. It brings up the ruling of the judge directing the order on the record before him and that only.

The appellate court is limited by the terms of the act to the determination of questions of law arising in the proceedings.<sup>1</sup> It can not revise matters of fact or mixed matters of fact and law.<sup>2</sup> The finding of facts by the judge or referee is binding on the appellate court.<sup>2</sup>

<sup>41</sup> In re Hassenbusch (C. C. A. 6th Cir.), 108 Fed. Rep. 35, 47 C. C. A. 177.

<sup>42</sup> In re McGill (C. C. A. 6th Cir.), 106 Fed. Rep. 57, 45 C. C. A. 218, 5 Am. B. R. 155.

43 Kyle Lumber Co. v. Bush (C. C. A. 5th Cir.), 133 Fed. Rep. 688, 66 C. C. A. 592, 13 Am. B. R. 535.

<sup>1</sup> Mueller v. Nugent, 184 U. S. 1, 46 L. Ed. 405, 7 Am. B. R. 224; Cunningham v. German Ins. Bank (C. C. A. 6th Cir.), 103 Fed. Rep. 932, 43 C. C. A. 377, 4 Am. B. R. 192; In re Taft (C. C. A. 6th Cir.), 133 Fed. Rep. 511, 66 C. C. A. 385, 13 Am. B. R. 417; Kenova Loan & T. Co. v. Graham (C. C. A. 4th Cir.), 135 Fed. Rep. 717, 68 C. C. A. 355, 14 Am. B. R. 313; In re Stewart (C. C. A. 6th Cir.), 179 Fed. Rep. 222, 102 C. C. A. 348, 24 Am. B. R. 691.

In First Nat. Bank of Chicago v. Chicago Title & T. Co., 198 U. S. 280. 291, 49 L. Ed. 1051, 14 Am. B. R. 102, the supreme court said:

"But this was an appeal and not a petition for revision, and hence it was that the circuit court of appeals reviewed the questions of fact and declined to accept the findings of the referee and the district court. In the exercise of supervisory power, it would have been confined to matter of law."

<sup>2</sup> In re Purvine (C. C. A. 5th Cir.), 96 Fed. Rep. 192, 37 C. C. A. 446, 2 Am. B. R. 787; In re Union Trust Co. (C. C. A. 1st Cir.), 122 Fed. Rep. 937, 59 C. C. A. 461, 9 Am. B. R. 767; In re Whitener (C. C. A. 5th Cir.), 105 Fed. Rep. 180, 44 C. C. A. 434, 5 Am. B. R. 198; In re Leech (C. C. A. 6th Cir.), 171 Fed. Rep. 622, 96 C. C. A. 424, 22 Am. B. R. 599; In re Irwin (C. C. A. 3d Cir.), 174 Fed Rep. 642, 98 C. C. A. 396, 23 Am. B. R. 487; Duryea Power Co. v. Sternbergh, 218 U. S. 299; In re Frank (C. C. A. 8th Cir.), 182 Fed. Rep. 794, 105 C. C. A. 226, 25 Am. B. R. 486.

In this respect the present statute differs from the act of 1867. Although the former act provided for revising matters' of fact as well as points of law, it is noticeable that under the act the questions presented were generally mere points of law.8 There were a few cases in which evidence was admitted in the circuit courts.4 It is clear that such proceedings can not be had under the present act.

If no question of law is presented by the petition it should be dismissed.5

The appellate court may look to the finding of facts to see if there are any facts to support the order. If the record does not contain the evidence it will be presumed that the facts disclosed were sufficient to sustain the finding and order.6

#### § 812. Review of discretionary orders.

There are two kinds of judicial discretion. First, a legal discretion, which must be exerted in view of the facts sufficiently proved and is controlled by fixed rules of law. And, second, a personal discretion, which is the individual judgment of the court and is not governed by any fixed principles or rules.1

<sup>3</sup> R. S. Sec. 4986.

<sup>4</sup> Langley v. Perry, No. 8667 Fed. Cas., 2 N. B. R. 596; Farrin v. Crawford, No. 4686 Fed. Cas., 2 N. B. R. 602; In re Alexander, No. 160 Fed. Cas., Chase, 295. But see In re Great Western Tel. Co., No. 5739 Fed. Cas., 5 Biss. 359; First Nat. Bank of Troy v. Cooper, 20 Wall. 171, 22 L. Ed. 273.

<sup>5</sup> Ellis v. Krulewitch (C. C. A. 8th Cir.), 141 Fed. Rep. 954, 73 C. C. A. 270, 15 Am. B. R. 615; In re Taft (C. C. A. 6th Cir.), 133 Fed. Rep. 511, 66 C. C. A. 385, 13 Am. B. R. 417; In re Pettingill & Co. (C. C. A. 1st Cir.), 137 Fed. Rep. 840, 70 C. C. A. 338, 14 Am. B. R. 757.

6 In re Baum (C. C. A. 8th Cir.), 169 Fed. Rep. 410, 94 C. C. A. 632, 22 Am. B. R. 295; In re Leech (C. C. A. 6th Cir.), 171 Fed. Rep. 622, 96 C. C. A. 424, 22 Am. B. R. 599; In re Roadarmour (C. C. A. 6th Cir.), 177 Fed. Rep. 379, 100 C. C. A. 611, 24 Am. B. R. 49; Hegner v. American Trust & Sav. Bank. (C. C. A. 7th Cir.), 187 Fed. Rep. 599. 109 C. C. A. -, 26 Am. B. R. 571. \*

<sup>1</sup> For a general discussion of the power of an appellate court to review judicial discretion generally; see Secs. 49, 50 and 51 of Loveland on Appellate Jurisdiction of the Federal Courts.

Rulings of the court involving the exercise of legal discretion involve questions of law, which may be revised on petition. Thus the granting or refusing to grant an application for a receiver,<sup>2</sup> or an order setting aside or refusing to set aside an adjudication,<sup>3</sup> or an order granting or refusing leave to amend a petition, or schedules, or specifications in opposition to a discharge in bankruptcy,<sup>4</sup> may present questions of law, which may be revised on petition by a circuit court of appeals.

The decision or order will not be disturbed by an appellate court unless there has been a plain disregard of some settled rule of law or equity, which should govern the discretion of the court of bankruptcy.<sup>5</sup> But if that court has manifestly fallen into some mistake of law, material to its decision, its action may be reversed or modified by the appellate court.<sup>6</sup>

<sup>2</sup> As was done in *In re* Oakland Lumber Co. (C. C. A. 2d Cir.), 174 Fed. Rep. 634, 98 C. C. A. 388, 23 Am. B. R. 181; Faulk & Co. v. Steiner, Lobman & Frank (C. C. A. 5th Cir.), 165 Fed. Rep. 861, 91 C. C. A. 547, 21 Am. B. R. 623; Beach v. Macon Grocery Co. (C. C. A. 5th Cir.), 116 Fed. Rep. 143, 53 C. C. A. 463, 8 Am. B. R. 751.

<sup>8</sup> Brady v. Bernard & Kittinger (C. C. A. 6th Cir.). 170 Fed. Rep. 576, 95 C. C. A. 656, 22 Am. B. R. 342; *In re* Ives (C. C. A. 6th Cir.), 113 Fed. Rep. 911, 51 C. C. A. 541, 7 Am. B. R. 692.

<sup>4</sup> In re Carley (C. C. A. 3d Cir.), 117 Fed. Rep. 130, 55 C. C. A. 146, 8 Am. B. R. 720; Conway v. German (C. C. A. 4th Cir.). 166 Fed. Rep. 67, 91 C. C. A. 653, 21 Am. B. R. 527; Pittsburgh Laundry Co. v. Imperial Laundry Co. (C. C. A. 3d Cir.), 154 Fed. Rep. 662, 83 C. C. A. 486, 18 Am. B. R. 756. Goodman v. Curtis (C. C. A. 5th Cir.), 174

Fed. Rep. 644, 99 C. C. A. 398, 23 Am. B. R. 504.

<sup>5</sup> In re Purvine (C. C. A. 5th Cir.), 96 Fed. Rep. 192, 37 C. C. A. 447, 2 Am. B. R. 787; In re Lesser (C. C. A. 2d Cir.), 99 Fed. Rep. 913, 40 C. C. A. 177, 3 Am. B. R. 378; In re Fischer (C. C. A. 2d Cir.), 175 Fed. Rep. 531, 99 C. C. A. 153; In re Levi v. Klauber, (C. C. A. 2d Cir.), 142 Fed. Rep. 962, 74 C. C. A. 132, 15 Am. B. R. 194. <sup>6</sup> As was done in Goodman v. Curtis (C. C. A. 5th Cir.), 174 Fed. Rep. 644, 98 C. C. A. 398, 23 Am. B. R. 504; In re Carley (C. C. A. 3d Cir.), 117 Fed. Rep. 130, 55 C. C. A. 146, 8 Am. B. R. 720; Conway v. German (C. C. A. 4th Cir.), 166 Fed. Rep. 67, 91 C. C. A. 653, 21 Am. B. R. 527; In re Oakland Lumber Co. (C. C. A. 2d Cir.), 174 Fed. Rep. 634, 98 C. C. A. 388, 23 Am. B. R. 181; In re Rosser (C. C. A. 8th Cir.), 101 Fed. Rep. 562, 41 C. C. A. 497, 4 Am. B. R. 153.

It may be said generally that the exercise of the personal discretion of a court does not present a question of law, and, therefore, can not be revised by an appellate court in the absence of gross abuse of such discretion.<sup>7</sup>

Matters of practice in the court of bankruptcy, not regulated by statute or the general orders, are generally within the discretion of the court and its action in such matters is not reviewable on petition.<sup>8</sup>

In the absence of gross abuse of discretion the appellate court will not revise the action of the court of bankruptcy disposing of a motion to postpone or continue a hearing, or to reopen a default or reinstate a petition which has been legally dismissed, or an order to determine the order of introducing evidence, the times when it is to be introduced, or a refusal to suppress depositions taken out of time, or the granting or withholding process, or an order settling the form of the order to be entered, or requiring a specification to a bankrupt's discharge to be verified, or to dismiss a petition for want of prosecution, or the amount of an attorney's fee, or a refusal to sanction an arrangement between the bankrupt and certain of his creditors and persons who had received preferential transfers.

<sup>7</sup> Mulford v. Fourth St. Nat. Bank (C. C. A. 3d Cir.), 157 Fed. Rep. 897, 85 C. C. A. 225, 19 Am. B. R. 742; In re Thaw (C. C. A. 3d Cir.), 166 Fed. Rep. 71, 91 C. C. A. 657, 21 Am. B. R. 261; In re Brown (C. C. A. 5th Cir.), 112 Fed. Rep. 49, 50 C. C. A. 118, 7 Am. B. R. 252.

8 In re Brown (C. C. A. 5th Cir.),
112 Fed. Rep. 49, 50 C. C. A. 118,
7 Am. B. R. 252; In re Levi & Klauber (C. C. A. 2d Cir.), 142 Fed. Rep.
962, 74 C. C. A. 132, 15 Am. B. R. 294.

9 In re Thaw (C. C. A. 3d Cir.), 166 Fed. Rep. 71, 91 C. C. A. 657, 21 Am. B. R. 261.

10 In re Fischer (C. C. A. 2d

Cir.), 175 Fed. Rep. 531, 99 C. C. A. 153, 23 Am. B. R. 427,

<sup>11</sup> In re Brown (C. C. A. 5th Cir.), 112 Fed. Rep. 49, 50 C. C. A. 118, 7 Am. B. R. 252.

<sup>12</sup> In re Levi & Klauber (C. C. A.
 2d Cir.), 142 Fed. Rep. 962, 74 C. C.
 A. 132, 15 Am. B. R. 294.

<sup>18</sup> In re Fischer (C. C. A. 2d Cir.), 175 Fed. Rep. 531, 99 C. C. A. 153, 23 Am. B. Ř. 427; In re Irwin (C. C. A. 3d Cir.), 174 Fed. Rep. 642, 98 C. C. A. 396, 23 Am. B. R. 487.

14 Mulford v. Fourth St. Nat. Bank
 (C. C. A. 3d Cir.), 157 Fed. Rep.
 897, 85 C. C. A. 225, 19 Am. B. R.
 742.

# § 813. Revisory jurisdiction does not extend to appealable orders.

The revisory jurisdiction is confined to proceedings in bankruptcy proper, and does not extend to orders in cases which may be reviewed on appeal under section 25a.<sup>1</sup>

The circuit courts of appeals do not appear to have so restricted this revisory jurisdiction in the early cases. They entertained petitions for revision in many cases to review judgments in bankruptcy proceedings proper from which an appeal lay, as well as interlocutory orders and final decrees on intervening petitions in equity.<sup>2</sup> The objection that these courts had no revisory jurisdiction in such cases does not appear to have been brought to the attention of the court.

<sup>1</sup> In re Mueller (C. C. A. 6th Cir.), 135 Fed. Rep. 711, 68 C. C. A. 349, 14 Am. B. R. 256; In. re Friend (C. C. A. 7th Cir.), 134 Fed. Rep. 778, 67 C. C. A. 500, 13 Am. B. R. 595. But see In re Holmes (C. C. A. 8th Cir.), 142 Fed. Rep. 391, 73 C. C. A. 491, 15 Am. B. R. 689. <sup>2</sup> In re Holmes (C. C. A. 8th Cir.), 142 Fed. Rep. 391, 73 C. C. A. 491, 15 Am. B. R. 689, the court cites an instance of the exercise of its revisory jurisdiction to review a judgment refusing to adjudge the defendant a bankrupt, which was clearly appealable under Section 25a, in the following language: "In the year 1903, an original petition to revise in the matter of law proceedings of the district court of Kingfisher county, Okl., which culminated on April 6, 1903, in an order which dismissed an involuntary petition in bankruptcy was presented to this court. The order of the district court was a 'judgment refusing to adjudge the defendant a bankrupt,' it was appealable under Bankr. Act July 1, 1898, c. 541, Sec.

25a, 30 Stat, 553, and an appeal from it would have brought up for review all the preceding rulings in the case. This court certified these facts to the supreme court, and inquired whether it had jurisdiction to superintend and revise, in matter of law, these proceedings in the district court of Kingfisher county, and the supreme court answered in the affirmative. The fact that the only real object of the petition in that case was to reverse the judgment refusing to adjudge the defendant a bankrupt was disclosed by the certificate to the supreme court and appears in the report of the case. Plymouth Cordage Co. v. Smith, 194 U. S. 311, 48 L. Ed. 992. After the rendition of this decision this court proceeded upon the original petition for revision to review and reverse the judgment of the district court of Kingfisher county and to direct it to take farther proceedings in the case. In re Plymouth Cordage Co., 135 Fed. Rep. 1000, 13 Am. B. R. 665,"

Questions of law arising in the process of a jury trial in bankruptcy can not be reviewed under this provision, but only on writ of error.<sup>3</sup>

# § 814. Revisory jurisdiction does not extend to interlocutory orders in suits at law and equity.

Section 24b provides for revision in matters of law "the proceedings in the several inferior courts of bankruptcy."

The word "proceedings" relates only to proceedings in bankruptcy proper. The revisory jurisdiction does not extend to any order either interlocutory or final in a controversy arising in bankruptcy.<sup>1</sup> The statute does not contemplate that the doors of the appellate courts shall be open to a separate review of each ruling made during a trial, or of interlocutory orders generally, in suits at law or in equity arising out of the settlement of bankrupt estates.

# § 815. Application for revision—time limit, etc.

The revisory power of the circuit courts of appeals is exercised on due notice and petition by a party aggrieved.<sup>1</sup>

The exercise of this general jurisdiction is not placed by the act under specified regulations and restrictions, like the

In re Gailey (C. C. A. 7th Cir.), 127 Fed. Rep. 538, 62 C. C. A. 336, 11 Am. B. R. 539, the circuit court of appeals reviewed an order denying a discharge on petition to review.

8 See writ of error to review a jury trial, Sec. 830, post. Elliott v. Toeppner, 187 U. S. 329, 47 L. Ed. 200, 9 Am. B. R. 50; Grant Shoe Co. v. Laird, 203 U. S. 502, 51 L. Ed. 292, 17 Am. B. R. 1.

<sup>1</sup> Morehouse v. Pacific Hdwe. & Steel Co. (C. C. A. 9th Cir.), 177 Fed. Rép. 337, 100 C. C. A. 647, 24 Am. B. R. 178; *In re* Rusch (C. C.

A. 7th Cir.), 116 Fed. Rep. 270, 53 C. C. A. 631, 8 Am. B. R. 518; In re Jacobs (C. C. A. 8th Cir.), 99 Fed. Rep. 539, 39 C. C. A. 647, 3 Am. B. R. 671; Doroshow v. Ott (C. C. A. 3d Cir.), 134 Fed. Rep. 740, 67 C. C. A. 644, 14 Am. B. R. 34.

But see *In re* Lee (C. C. A. 8th Cir.), 182 Fed. Rep. 579, 105 C. C. A. 117, 25 Am. B. R. 436, where it is held that a judgment appealable under Sec. 24a of the act May also be reviewed on petition for revision at the option of the defeated party.

<sup>1</sup> B. A. 1898, Sec. 24b.

proceeding by appeal or writ or error.<sup>2</sup> Congress has left these regulations to the discretion of the circuit courts of appeals, and to the rules to be prescribed by the supreme court. As yet the supreme court has prescribed no rules concerning it. Until it does, the circuit court of appeals may prescribe rules and regulations, so far as they do not conflict with the statute.<sup>3</sup>

The act prescribes no time within which the application for a review must be presented. An appeal is required to be taken within ten days. Not so with a petition for a review. Undoubtedly the application should be made within a reasonable time, in order that the proceedings to settle the bankrupt's estate may not be delayed, but neither the act nor any rule of the supreme court determines what that time is. It must, therefore, be left to depend upon the circumstances of each case. It has generally been fixed, by analogy to the period designated within which appeals must be taken, to six months. If a time limit is fixed by rule of the circuit court of appeals it must be observed.

<sup>2</sup> Mr. Justice Chase, in construing the act of 1867, *In re* Alexander, No. 160 Fed. Cas., Chase, 295.

<sup>3</sup> See Rule 36 (C. C. A. 1st Cir.), and Rules 36 to 44 (C. C. A. 8th Cir.), 150 Fed. Rep.; *In re* Leech (C. C. A. 6th Cir.), 171 Fed. Rep. 622, 96 C. C. A. 424, 22 Am. B. R. 599.

<sup>4</sup> B. A. 1898, Sec. 25a.

<sup>5</sup> In re Thomlinson (C. C. A. 8th Cir.), 154 Fed. Rep. 834, 83 C. C. A. 550, 18 Am. B. R. 691; In re Youngstrom (C. C. A. 8th Cir.), 153 Fed. Rep. 98, 82 C. C. A. 232, 18 Am. B. R. 572; In re Worcester County (C. C. A. 1st Cir.), 102 Fed. Rep. 808, 42 C. C. A. 637, 4 Am. B. R. 496; In re Holmes (C. C. A. 8th Cir.), 142 Fed. Rep. 391, 73 C. C.

A. 491, 15 Am. B. R. 689; In re Groetzinger & Sons (C. C. A. 3d Cir.), 127 Fed. Rep. 124, 62 C. C. A. 124, 11 Am. B. R. 467; In re Mueller (C. C. A. 6th Cir.), 135 Fed. Rep. 711, 68 C. C. A. 349, 14 Am. B. R. 256.

In Blanchard v. Ammons (C. C. A. 9th Cir.), 183 Fed. Rep. 556, 106 C. C. A. 102, 25 Am. B. R. 590, a delay of more than two years was held fatal.

<sup>6</sup> In the second circuit the time is regulated by rule 38 which limits the time to ten days. *In re* Strobel (C. C. A. 2d Cir.), 160 Fed. Rep. 916, 88 C. C. A. 98, 20 Am. B. R. 22; *In re* Brown (C. C. A. 2d Cir.), 174 Fed. Rep. 339, 98 C. C. A. 211, 23 Am. B. R. 93.

The application for a review and revision of the action of a court of bankruptcy can be made only by a person aggreeved by such action.

The second petition to review the same matter as a previous petition will not be permitted.8

# § 816. The petition for revision.

The application for the exercise of revisory power is made by petition.<sup>1</sup>

The petition should be filed in the circuit court of appeals for the circuit in which the court of bankruptcy, whose action is to be reviewed, is held.<sup>2</sup> It is not necessary that a petition to revise be allowed by a judge of the appellate court or the court below, or that an appeal bond be given, or that a citation issue or a transcript of record in the court below filed.<sup>3</sup> The filing of a petition for revision is the beginning of an original proceeding in the circuit court of appeals, invoking the exercise of its appellate jurisdiction.

The petition should be entitled in the appellate court with the style of the case, and should state the proceedings in court

R. Co. v. Jones, No. 127 Fed. Cas., 7 N. B. R. 145; In re Baker (C. C. A. 1st Cir.), 104 Fed. Rep. 287, 43 C. C. A. 536, 4 Am. B. R. 778.

In Clark v. Pidcock (C. C. A. 3d Cir.), 129 Fed Rep. 745, 64 C. C. A. 273, 12 Am. B. R. 309, the court said: "We are disposed, however, to give liberal construction to the language used here, and a doubt in regard to the same should be resolved in favor of the petitioner. The petitioner who invokes our jurisdiction under this

section, was a judgment creditor

<sup>7</sup> B. A. 1898, Sec. 24b; Ala. & C.

of the bankrupt, and so scheduled by him in his bankruptcy petition. Whether he may or may not hereafter be allowed to prove his claim, he has an interest as a general creditor in the estate of the bankrupt."

<sup>8</sup> Beach v. Macon Grocery Co. (C. C. A. 5th Cir.), 120 Fed. Rep. 736, 52 C. C. A. 150, 9 Am. B. R. 762.

<sup>1</sup> B. A. 1898, Sec. 24b.

<sup>2</sup> In re Williams, 105 Fed. Rep. 906, 5 Am. B. R. 198, note.

<sup>8</sup> Meyer Drug Co. v. Pipkin Drug Co. (C. C. A. 5th Cir.), 136 Fed.

of bankruptcy sufficient to show the jurisdiction of that court, and clearly and specifically point out the question of law decided by the district court and the particular error or errors of law complained of, charging that the petitioner is aggrieved thereby, and praying the circuit court of appeals to review and revise the decision of the court below.<sup>4</sup>

It is not necessary to allege any value in relation to the question or matters concerning which a review is sought.<sup>5</sup>

The petition should be signed and verified by the petitioner, or his agent and attorney, if he has knowledge of the facts sufficient to make the affidavit.

All persons interested in the controversy should be made parties to the petition and have notice of the filing of it. Where the trustee represents the creditors in the bankruptcy court he only need be made party respondent in the circuit court of appeals.<sup>6</sup>

Petitions for review may be amended in the discretion of the court.

### § 817. The record on petition for revision.

The petitioner must file a certified transcript of the record and proceedings in the bankruptcy court of the matter to be reviewed in the office of the clerk of the circuit court of

Rep. 396, 69 C. C. A. 240, 14 Am. B. R. 477.

4 In re Richards (C. C. A. 7th Cir.), 96 Fed. Rep. 935, 37 C. C. A. 643, 3 Am. B. R. 145; In re Baker (C. C. A. 1st Cir.), 104 Fed. Rep. 287, 43 C. C. A. 536, 4 Am. B. R. 778; In re Seebold (C. C. A. 5th Cir.), 105 Fed Rep. 910, 45 C. C. A. 117, 5 Am. B. R. 358; In re Taft (C. C. A. 6th Cir.), 133 Fed. Rep. 511, 66 C. C. A. 385, 13 Am. B. R. 417.

For forms of petitions for review see Forms, Nos. 178 et seq., post. <sup>5</sup> In re Rouse, Hazard & Co. (C.

C. A. 7th Cir.), 91 Fed Rep. 96, 33C. C. A. 356, 1 Am. B. R. 234.

<sup>6</sup> In re Utt (C. C. A. 7th Cir.), 105 Fed. Rep. 754, 45 C. C. A. 32, 5 Am. B. R. 383.

<sup>7</sup> Gen. Ord. 11. Knight v. Cheney, No. 7883 Fed Cas., 5 N. B. R. 305; Littlefield v. Del. & Hud. Canal Co., No. 8400 Fed. Cas., 3 Cliff. 371.

appeals.<sup>1</sup> The record must be certified by the clerk and not by the referee.<sup>2</sup>

The record is usually filed with the petition, but may be filed later.<sup>3</sup>

The statute and general orders do not provide what the record on revision shall contain. It should consist of a certified copy of so much of the record and proceedings of the bankruptcy court as is necessary to exhibit the manner in which the question of law arose and its determination. This includes the order of the court of bankruptcy sought to be reviewed and the testimony or settlement of facts whereon the order is predicated.<sup>4</sup>

There has been some confusion as to bringing up a record of the testimony or facts. The better practice is to obtain a statement of the findings of fact by the court below, or

<sup>1</sup> Hegner v. American Trust & . Sav. Bank (C. C. A. 7th Cir.), 187 Fed. Rep. 599, 109 C. C. A. -, 26 Am. B. R. 571; In re Leech (C. C. A. 6th Cir.), 171 Rep. 622, 96 C. C. A. 424, 22 Am. B. R. 599; In re Boston Dry Goods Co. (C. C. A. 1st Cir.), 125 Fed. Rep. 226, 60 C. C. A. 118, 11 Am. B. R. 97; In re Shoe & Leather Reporter (C. C. A. 1st Cir.), 129 Fed. Rep. 588, 64 C. C. A. 156, 12 Am. B. R. 248; In re Richards (C. C. A. 7th Cir.), 96 Fed. Rep. 935, 37 C. C. A. 634, 3 Am. B. R. 145; Steiner v. Marshall (C. C. A. 4th Cir.), 140 Fed. Rep. 710, 72 C. C. A. 103, 15 Am. B. R. 486.

In re Roadamour (C. C. A. 6th Cir.), 177 Fed. Rep. 379, 100 C. C. A. 611, 24 Am. B. R. 49, Judge Knappen said: "The allegation in the petition for review filed in this court is no evidence of such fact; nor is the allegation referred to

put in issue. We are confined to the record attached to the petition or sent up in connection with the proceedings to review."

<sup>2</sup> Cook Inlet Coal Fields Co. v. Caldwell (C. C. A. 4th Cir.), 147 Fed. Rep. 475, 78 C. C. A. 17, 17 Am. B. R. 135.

<sup>3</sup> Rule 36, paragraph 2 (C. C. A. 4th Cir.), provides for filing the record within thirty days from the date of filing the petition.

<sup>4</sup> Hegner v. American Trust & Sav. Bank (C. C. A. 7th Cir.), 187 Fed. Rep. 599, 109 C. C. A. —, 26 Am. B. R. 571; Steiner v. Marshall (C. C. A. 4th Cir.), 140 Fed. Rep. 710, 72 C. C. A. 103, 15 Am. B. R. 486; In re Taft (C. C. A. 6th Cir.), 133 Fed. Rep. 511, 66 C. C. A. 385, 13 Am. B. R. 417; In re Pettingill & Co., (C. C. A. 1st Cir.), 137 Fed. Rep. 840, 70 C. C. A. 338, 14 Am. B. R. 757.

something else as a substitute therefor, when evidence has been taken on issues of fact and not a certified copy of the testimony itself.<sup>5</sup> A summary of evidence or finding of fact certified by the referee to the district judge is sufficient, unless a trial *de novo* is had by the district judge. The opinion of the court is not sufficient for this purpose, but may be referred to for the purpose of ascertaining what propositions of law governed the court in which the opinion was filed, or for the general purpose of determining whether the case went off on facts or law.<sup>6</sup>

It is not unusual for the record to include the whole of the evidence, instead of a statement of the ultimate facts found by the referee or judge. This is improper because the court can not review the evidence to determine the facts, but is limited to reviewing the conclusions of law necessarily raised and decided upon the facts found by the court of bankruptcy.<sup>7</sup>

<sup>5</sup> In re Taft (C. C. A. 6th Cir.), 133 Fed. Rep. 511, 66 C. C. A. 385, 13 Am. B. R. 417; Steiner v. Marshall (C. C. A. 4th Cir.), 140 Fed. Rep. 710, 72 C. C. A. 103, 15 Am. B. R. 486; In re Pettingill & Co. (C. C. A. 1st Cir.), 137 Fed. Rep. 840, 70 C. C. A. 338, 14 Am. B. R. 757; In re Boston Dry-Goods Co. (C. C. A. 1st Cir.), 125 Fed. Rep. 226, 60 C. C. A. 117, 11 Am. B. R. 97; In re O'Connell (C. C. A. 1st Cir.), 137 Fed. Rep. 838, 70 C. C. A. 336, 14 Am. B. R. 237.

<sup>6</sup> In re Pettingill & Co. (C. C. A. 1st Cir.), 137 Fed. Rep. 840, 70 C.
C. A. 338, 14 Am. B. R. 757; In re Boston Dry Goods Co. (C. C. A. 1st Cir.), 125 Fed. Rep. 266, 60 C. C. A. 117, 11 Am. B. R. 97.

<sup>7</sup> In re Taft (C. C. A. 6th Cir.), 133 Fed. Rep. 511, 66 C. C. A. 385, 13 Am. B. R. 417; Steiner v. Marshall (C. C. A. 4th Cir.), 140 Fed. Rep. 710, 72 C. C. A. 103, 15 Am. B. R. 486.

In re Leech (C. C. A. 6th Cir.), 171 Fed. Rep. 622, 96 C. C. A. 421, Am. B. R. 599, Judge Severens said: "Upon the question whether the conclusion of the court on which it based its order, namely that the rings were exempt property, was correct or not, would depend largely on facts not found by the judge nor by the referee, \* \* \* if there had been an issue it would have devolved upon the referee or the judge, to find the facts so that the reviewing court might apply the law to the facts found by the court whose findings of fact are final. This case is not peculiar in this respect. We have on several occasions experienced the same difficulties."

Where an appeal and a petition for revision is filed in the same proceeding only one record need be filed.<sup>8</sup> This usually the record on appeal to which reference is made in the petition. In such cases care should be taken that the record contains a statement of the finding of facts by the judge or referee.

If the record fails to include any papers which the respondent considers necessary he may apply for a writ of *certiorari* to bring up such additional papers as he may wish. If he shall insist upon including in the record unnecessary matter the court may prevent injustice being done the petitioner in dealing with the costs. Where there is a dispute between the parties as to what papers were before the district court, the judge may be requested to certify thereto. In

### § 818. Service of petition for revision.

Upon filing a petition for review in a circuit court of appeals due notice must be given adverse parties.<sup>1</sup>

The notice required may be given by the petitioner or his attorney or other person delivering a copy of the petition to the respondent and proof of service made either in the form of an affidavit or acceptance of service. The proof of service should be filed in the appellate court. The clerk of the appellate court may be requested to serve a copy of the printed petition upon the respondent or his attorney after the petition has been docketed and printed. This is sufficient notice, but the better practice is to serve a formal notice.<sup>2</sup>

The service of a petition upon a person who acted as counsel for the respondent in the original proceedings is

<sup>8</sup> Gillespie v. Piles & Co. (C. C. A. 8th Cir.), 178 Fed. Rep. 886, 102 C. C. A. 120, 24 Am. B. R. 502.
9 As to certiorari see sec. 844 host.

<sup>&</sup>lt;sup>10</sup> In re Fischer (C. C. A. 2d Cir.), 175 Fed. Rep. 531, 99 C. C. A. 153, 23 Am. B. R. 427.

<sup>&</sup>lt;sup>1</sup> B. A. 1898, Sec. 24b; In re Utt (C. C. A. 7th Cir.), 105 Fed. Rep. 754, 45 C. C. A. 32, 5 Am. B. R. 383; In re Abraham, 93 Fed. Rep. 767, 2 Am. B. R. 266.

<sup>&</sup>lt;sup>2</sup> For form of notice, see Form No. 176, post.

sufficient.<sup>3</sup> The proceedings in review are a part of the original case, and for the purpose of review the parties are still in court. The proceeding in review is intended to be speedy and summary, and a reasonable notice to counsel accomplishes the ends of justice. A defective service is cured by appearance in the circuit court of appeals.<sup>4</sup>

## § 819. Bond and supersedeas on revision.

No bond in the nature of an appeal bond is necessary on a petition for revision.<sup>1</sup> A cash deposit as security for costs and printing the record is required to be made in the circuit court of appeals.

A petition for revision does not transfer the case as a whole to the appellate court. It brings up the order that is sought to be reviewed and that only. It does not operate as a supersedeas.<sup>2</sup> The court below may proceed in the case as if no review had been asked.

The court of bankruptcy has power, in its discretion, to stay proceedings pending the review. A judge of the appellate court can not grant a stay. The circuit court of appeals may grant a stay of the execution of the order to be reviewed, but has no power to grant a stay of other proceedings in the court below. Its appellate jurisdiction extends only to the order sought to be reviewed.

# § 820. Response to a petition for revision.

Several circuit courts of appeals have provided by rule that a party may demur, plead or answer to a petition for revision within a time fixed in the rule.<sup>1</sup>

- <sup>3</sup> Ala. & C. R. Co. v. Jones, No. 126 Fed. Cas., 5 N. B. R. 97.
- <sup>4</sup> Ala. & C. R. Co. v. Jones, No. 124 Fed. Cas., 5 N. B. R. 97.
- <sup>1</sup> Meyer Bros. Drug Co. v. Pipkin Drug Co. (C. C. A. 5th Cir.), 136 Fed. Rep. 396, 69 C. C. A. 240, 14 Am. B. R. 477.
- <sup>2</sup> In re Orman (C. C. A. 5th Cir.), 107 Fed. Rep. 101, 46 C. C. A. 165,
- 5 Am. B. R. 698; *In re* Ironclad Mfg. Co. (C. C. A. 2d Cir.), 190 Fed. Rep. 320.
- 3 In re Steele 162 Fed. Rep. 694,722, 20 Am. B. R. 575.
- <sup>4</sup> In re Ironclad Mfg. Co. (C. C. A. 2d Cir.), 190 Fed. Rep. 320.
- <sup>1</sup> Rule 36 C. C. A. first and fourth circuits, 150 Fed. Rep. XLVII and LXXII. *In re* Baker (C. C. A.

If the petition does not properly present a question of law within the revisory jurisdiction of the appellate court, a motion to dismiss lies. This is the ordinary response to a petition of this character and not a demurrer.

No plea or answer is ordinarily required or proper. No issue of fact can be made in the appellate court. That court revises only questions of law arising upon the record before the district judge. No new evidence is introduced in the appellate court.

If the record does not contain a sufficient statement of the ultimate facts found by the court below, the respondent may move to dismiss the petition, or apply for a writ of *certiorari* to bring up such additional record as may be necessary to show them.

#### § 821. The hearing and order on petition for revision.

Upon filing the petition the case is docketed. The style may be "In The Matter of the Petition of S. G. for Revision in the case of the A. B. Company, Bankrupt."

The petition and record are printed as in other cases. The case is regularly heard upon the petition and record. Counsel are permitted to file briefs and make oral arguments. The attorney for the petitioner opens and closes the argument.

The case is brought on for hearing in regular order in the same manner as other cases in the circuit courts of appeals. A petition for revision is not ordinarily entitled to be advanced for hearing. The court may advance it upon good cause shown.

The order of the circuit court of appeals is regularly an affirmance, reversal or modification of the order of the court below, with such directions as justice may require. The

1st Cir.), 104 Fed. Rep. 287, 43 C. C. A. 536, 4 Am. B. R. 778.

Rule 39, C. C. A. eighth circuit, 150 Fed. Rep. CXIX, provides that "the response to the petition, when the defendant elects to make a

written response, shall be filed at least fifteen days before the day set for the hearing." In re Frank (C. C. A. 8th Cir.), 182 Fed. Rep. 794, 105 C. C. A. 226, 25 Am. B. R. 486.

appellate court does not execute the order, but by its mandate it directs the court of bankruptcy with reference to what should be done, as in the case of an appeal or writ of error.

No appeal lies to the supreme court from the decision of the circuit court of appeals upon a petition for review.<sup>1</sup> The only method of obtaining a revision of such decision by the supreme court is by a writ of *certiorari*.<sup>2</sup>

# § 822. Appeals in bankruptcy proceedings.

Section 25a of the bankrupt act confers upon the circuit court of appeals jurisdiction to review on appeal the judgments in bankruptcy proceedings proper in three classes of cases only.

• It provides "That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme court of the territories, in the following cases, to-wit, (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over."

If a case is comprehended within one of these classes the review must be by appeal, and not by petition for review, or writ of error.<sup>2</sup>

<sup>1</sup> Holden v. Stratton, 191 U. S., 115, 48 L. Ed. 116, 10 Am. B. R. 786; Duryea Power Co. v. Sternbergh, 218 U. S. 299.

<sup>2</sup> See *certiorari* to review decisions of the circuit courts of appeals. Sec. 859, *post*. Sec. 859, *post*.

Louisville Trust Co. v. Comingor, 181 U. S. 620, 45 L. Ed. 1031, and 184 U. S. 18, 46 L. Ed. 413, 7 Am. B. R. 427; Bryan v. Bernheimer, 175 U. S. 724, 44 L. Ed. 338, and 181 U. S. 188, 45 L. Ed. 814, 5 Am. B. R. 623; Mueller v. Nugent, 180 U. S. 640, 45 L. Ed. 711, and 184 U. S. 1, 46 L. Ed. 405, 7 Am. B. R. 224;

Holden v. Stratton, 191 U. S. 115, 48 L. Ed. 116, 10 Am. B. R. 786.

<sup>1</sup> In re Mueller (C. C. A. 6th Cir.), 135 Fed. Rep. 711, 68 C. C. A. 349, 14 Am. B. R. 256; In re Good (C. C. A. 8th Cir.), 99 Fed. Rep. 389, 39 C. C. A. 581, 3 Am. B. R. 605; In re Dickson (C. C. A. 1st Cir.), 111 Fed. Rep. 726, 49 C. C. A. 574, 7 Am. B. R. 186; Postlethwaite v. Hicks (C. C. A. 4th Cir.), 165 Fed. Rep. 897, 91 C. C. A. 575, 21 Am. B. R. 70.

In Cook Inlet Coal Fields Co. v. Caldwell (C. C. A. 4th Cir.), 147 Fed. Rep. 475, 479, 78 C. C. A.

An appeal will not lie to review an order or judgment made in a bankruptcy proceeding, unless it falls within one of these classes.<sup>3</sup>

The appeal lies from the order or judgment, and not the opinion of the judge. Until a judgment is entered no appeal lies.<sup>4</sup>

# § 823. Appeals from judgments adjudging or refusing to adjudge the defendant a bankrupt.

An appeal lies to the circuit court of appeals from a court of bankruptcy to review a judgment adjudging or refusing to adjudge the defendant a bankrupt.<sup>1</sup> This is a proceeding in bankruptcy.

17, 17 Am. B. R. 135, the court said: "As to the adjudication in bankruptcy, we are of the opinion that the question suggested as to its illegality can not be considered by this court under the present proceeding, (a petition for revision), the proper remedy, in event error is alleged in making the order being by an appeal duly taken."

<sup>2</sup> Lockman v. Lang (C. C. A. 8th-Cir.), 128 Fed. Rep. 279, 62 C. C. A. 550, 12 Am. B. R. 497. See writ of error to review jury trial, sec. 830, post.

<sup>8</sup> Brady v. Bernard & Kittinger (C. C. A. 6th Cir.), 170 Fed. Rep. 576, 95 C. C. A. 656, 22 Am. B. R. 342 and 217 U. S. 595, 54 L. Ed. 896; Francis v. McNeal (C. C. A. 3d Cir.), 170 Fed. Rep. 445, 95 C. C. A. 168, 22 Am. B. R. 337; Duryea Power Co. v. Sternbergh, 218 U. S. 299; Schuler v. Hassinger (C. C. A. 5th Cir.), 177 Fed. Rep. 119, 100 C. C. A. 539, 24 Am. B. R. 184; Gray v. Grand Forks Mercantile Co. (C. C. A. 8th Cir.), 138 Fed. Rep. 344, 70 C. C. A. 634, 14 Am. B. R. 780; Goodman

v. Brenner (C. C. A. 5th Cir.), 109
Fed. Rep. 481, 48 C. C. A. 516, 6
Am. B. R. 470; In re Columbia
Real Estate Co. (C. C. A. 7th Cir.),
112 Fed. Rep. 643, 50 C. C. A. 406,
7 Am. B. R. 441; In re Whitener
(C. C. A. 5th Cir.), 105 Fed. Rep.
180, 44 C. C. A. 434, 5 Am. B. R.
198; Fisher v. Cushman (C. C. A.
1st Cir.), 103 Fed. Rep. 860, 43
C. C. A. 381, 4 Am. B. R. 646;
Hutchinson v. LeRoy (C. C. A. 1st
Cir.), 113 Fed. Rep. 202, 51 C. C.
A. 159, 8 Am. B. R. 20.

In First Nat. Bank v. Title & Trust Co., 198 U. S. 280, 291, 49 L. Ed. 1051, 14 Am. B. R. 102, the supreme court said: "And in any view, the proceeding was a proceeding in bankruptcy. Being such, an appeal from the decree of the district court under section 25a did not lie, and parties aggrieved could only invoke the supervisory power under section 24b."

<sup>4</sup> In re Elkind (C. C. A. 2d Cir.), 175 Fed. Rep. 64, 99 C. C. A. 86, 23 Am. B. R. 166.

<sup>1</sup> B. A. 1898, Sec. 25 a. In re Neasmith (C. C. A. 6th Cir.), 147 An appeal is the proper method of reviewing such judgment, even where questions of law only are presented for review.<sup>2</sup> An appeal lies to review an adjudication by default.<sup>3</sup> A judgment granting or refusing an adjudication can not be reviewed on a petition for revision,<sup>4</sup> or on writ of error,<sup>5</sup> unless there is a trial by jury as of right.<sup>6</sup>

In some cases it is necessary to prosecute a writ of error and also an appeal to review an adjudication in bankruptcy.<sup>7</sup> If there is a jury trial the judgment on the verdict is reviewable on writ of error only. If other issues are involved the rulings of the court on them adjudging or refusing to adjudge the defendant to be bankrupt are reviewable by appeal.

Fed. Rep. 160, 77 C. C. A. 402, 17 Am. B. R. 128; Young v. Brande Bros. (C. C. A. 1st Cir.), 162 Fed. Rep. 663, 89 C. C. A. 455, 20 Am. B. R. 612; Taft Co. v. Century Savings Bank (C. C. A. 8th Cir.), 141 Fed. Rep. 369, 72 C. C. A. 671, 15 Am. B. R. 594.

<sup>2</sup> Taft Co. v. Century Sav. Bank (C. C. A. 8th Cir.) 141 Fed Rep. 369, 72 C. C. A. 671, 15 Am. B. R. 594.

<sup>3</sup> Young & Holland Co. v. Brande Bros. (C. C. A. 1st Cir.), 162 Fed. Rep. 663, 89 C. C. A. 455, 20 Am. B. R. 612.

\*In Cook Inlet Coal Fields Co. v. Caldwell (C. C. A. 4th Cir.), 147 Fed. Rep. 475, 479, 78 C. C. A. 17, 17 Am. B. R. 135 the court said: "As to the adjudication in bankruptcy, we are of the opinion that the question suggested as to its illegality can not be construed by this court under the present proceeding (a petition for revision) the proper remedy, in the event error is alleged in making the order being by an appeal duly taken."

<sup>5</sup> Lockman v. Lang (C. C. A. 8th Cir.), 128 Fed. Rep. 279, 62 C. C. A. 550, 12 Am. B. R. 497.

<sup>6</sup> Elliott v. Toeppner, 187 U. S. 327, 47 L. Ed. 200, 9 Am. B. R. 50; Grant Shoe Co. v. Laird, 203 U. S. 502, 51 L. Ed. 292, 17 Am. B. R. 1; Bower v. Holzworth (C. C. A. 8th Cir.), 138 Fed. Rep. 28, 70 C. C. A. 396, 17 Am. B. R. 22; Lennox v. Allen-Lane Co. (C. C. A. 1st Cir.), 167 Fed. Rep. 114, 92 C. C. A. 566, 21 Am. B. R. 648; Exploration Mercantile Co. v. Pacific Hdwr. Co. (C. C. A. 9th Cir.), 177 Fed. Rep. 825, 101 C. C. A. 39, 24 Am. B. R. 216.

In re Neasmith (C. C. A. 6th Cir.), 147 Fed. Rep. 160, 77 C. C. A. 402, 17 Am. B. R. 128, an appeal was sustained where a jury trial had been had after being waived.

<sup>7</sup> In Cummins Grocer Co. v. Talley (C. C. A. 6th Cir.), 187 Fed. Rep. 507, 109 C. C. A. —, 26 Am. B. R. 484, this was done and the case decided on both the appeal and the writ of error.

It is the order granting or refusing the adjudication that is reviewable on appeal. An appeal will not lie from an order refusing leave to intervene for the purpose of setting aside an adjudication, or from an order refusing to set aside an adjudication on petition for rehearing, or from an order adjudging a person to be a member of a bankrupt partnership and liable for its debts. An order that petitioning creditors have provable claims may be reviewed on petition before an adjudication.

The petitioning or intervening creditors or the bankrupt may take an appeal to review a judgment either refusing or making an adjudication.<sup>12</sup> The assignee for the benefit of creditors, who has intervened to contest the petition, has a right to appeal from the order of adjudication.<sup>13</sup> A bankrupt has the right to appeal or bring error even though proceedings for contempt are pending against him.<sup>14</sup>

An appeal under this clause lies only in involuntary proceedings because the word "defendant" implies that the proceeding is instituted against the debtor by his creditors. A creditor is not permitted to contest an adjudication in voluntary bankruptcy <sup>15</sup> and could not therefore be aggrieved by a

<sup>8</sup> In re Columbia Reãl Estate Co. (C. C. A. 7th Cir.), 112 Fed Rep. 643, 50 C. C. A. 406, 7 Am. B. R. 441.

Brady v. Bernard & Kittinger
(C. C. A. 6th Cir.), 170 Fed. Rep.
576, 95 C. C. A. 656, 22 Am. B. R.
342; In re Ives (C. C. A. 6th Cir.),
113 Fed. Rep. 911, 51 C. C. A. 541,
7 Am. B. R. 692.

Francis v. McNeal (C. C. A.
 Gir.), 170 Fed. Rep. 445, 95 C.
 C. A. 168, 22 Am. B. R. 337.

<sup>11</sup> In re Ellis (C. C. A. 6th Cir.), 143 Fed. Rep. 103, 74 C. C. A. 297, 16 Am. 221.

Simonson v. Sinsheimer (C. C.
 A. 6th Cir.), 100 Fed. Rep. 426,
 C. C. A. 474, 3 Am. B. R. 824;

Parmenter Mfg. Co. v. Stoever (C. C. A. 1st Cir.), 97 Fed. Rep. 330, 38 C. C. A. 200, 3 Am. B. R. 220; West Co. v. Lea, 174 U. S. 590, 43 L. Ed. 1098, 2 Am. B. R. 463.

See also Elliott v. Toeppner, 187 U. S. 327, 47 L. Ed. 200, 9 Am. B. R. 50; Grant Shoe Co. v. Laird, 203 U. S. 502, 51 L. Ed. 292, 17 Am. B. R. 1.

13 In re Meyer (C. C. A. 2d Cir.),
98 Fed. Rep. 976, 39 C. C. A. 368,
3 Am. B. R. 559.

<sup>14</sup> Exploration Mercantile Co. v. Pacific Hdwr. Co. (C. C. A. 9th Cir.), 177 Fed. Rep. 825, 101 C. C. A. 39, 24 Am. B. R. 216.

15 In re Jehu 94 Fed. Rep. 638.2 Am. B. R. 498.

decision either refusing or making an adjudication. But a bankrupt may review on appeal a judgment refusing an adjudication on his petition.

An adjudication will not be set aside on appeal, if supported by sufficient allegations and proof of one act of bankruptcy, because other acts were not properly pleaded or proved.<sup>16</sup>

# § 824. Appeals from judgments granting or denying a discharge.

An appeal lies to the circuit court of appeals from a court of bankruptcy to review a judgment granting or denying a discharge to the bankrupt.<sup>1</sup> This is a proceeding in bankruptcy.

An appeal lies from an order confirming a composition on the ground that it is a judgment granting a discharge.<sup>2</sup>

An appeal lies from an order refusing to confirm a composition of creditors,<sup>3</sup> or from an order dismissing an application for discharge for want of prosecution, on the ground that it is a judgment denying a discharge.<sup>4</sup>

An appeal will not lie from an order denying an application to revoke a discharge, because it neither denies nor grants a discharge.<sup>5</sup>

16 In re Lyman (C. C. A. 2d
 Cir.), 127 Fed. Rep. 123, 62 C. C.
 A. 123, 11 Am. B. R. 466.

<sup>1</sup> B. A. 1898, sec. 25a.

<sup>2</sup> In re Friend (C. C. A. 7th Cir.), 134 Fed. Rep. 778, 67 C. C. A. 500, 13 Am. B. R. 595, certiorari denied 197 U. S. 620, 49 L. Ed. 909. <sup>2</sup> United States v. Hammond (C.

C. A. 6th Cir.), 104 Fed. Rep. 862. 44 C. C. A. 229, 4 Am. B. R. 736, overruling In re Adler, 103 Fed. Rep. 444, 4 Am. B. R. 583; Marshall, Field & Co. v. Wolf & Bro. (C. C. A. 8th Cir.), 120 Fed. Rep. 815, 57 C. C. A. 326, 9 Am. B. B. 693; In

re Friend (C. C. A. 7th Cir.), 134 Fed. Rep. 778, 67 C. C. A. 500, 13 Am. B. R. 595. But see Ross v. Saunders (C. C. A. 1st Cir.), 105 Fed. Rep. 915, 45 C. C. A. 123, 5 Am. B. R. 350.

<sup>4</sup> In re Kuffler (C. C. A. 2d Cir.), 127 Fed. Rep. 125, 61 C. C. A. 259, 11 Am. B. R. 469; In re Semons (C. C. A. 2d Cir.), 140 Fed. Rep. 989, 72 C. C. A. 683.

<sup>6</sup> In Thompson v. Mauzy (C. C. A. 4th Cir.), 174 Fed. Rep. 611, 98 C. C. A. 457, 23 Am. B. R. 489; this question was presented but not decided.

A creditor or the bankrupt may appeal from the judgment of the court of bankruptcy either granting or refusing a discharge to the bankrupt in voluntary or involuntary proceedings. A trustee will not ordinarily be permitted to prosecute an appeal from such judgments, for the reason that the contest is between creditors and the bankrupt and does not affect the administration of the bankrupt's estate in any respect.

# § 825. Appeals from judgments allowing or rejecting claims.

An appeal lies to the circuit court of appeals from a court of bankruptcy to review a judgment allowing or rejecting a debt or claim of \$500 or over. This is a proceeding in bankruptcy.

A judgment allowing or rejecting a debt or claim of \$500 or over can not be reviewed on a petition for revision.<sup>2</sup>

"A debt or claim of \$500 or over" refers to a debt or claim presented for proof in the bankruptcy proceedings.3

Consult Brady v. Bernard & Kittinger (C. C. A. 6th Cir.), 170 Fed. Rep. 576, 95 C. C. A. 656, 22 Am. B. R. 342; In re Ives (C. C. A. 6th Cir.), 113 Fed. Rep. 911, 51 C. C. A. 541, 7 Am. B. R. 692.

6 In re Marshall Paper Co. (C.
C. A. 1st Cir.), 102 Fed. Rep. 872,
43 C. C. A. 38, 4 Am. B. R. 468;
In re Feldstein (C. C. A. 2d Cir.),
115 Fed. Rep. 259, 53 C. C. A. 479,
8 Am. B. R. 160; In re Gaylord (C. C. A. 2d Cir.),
112 Fed. Rep. 668, 50 C. C. A. 415, 7 Am. B. R. 1.

<sup>1</sup> B. A. 1898, sec. 25a. Coder v. Arts, 213 U. S. 223, 53 L Ed. 772, 22 Am. B. R. 1; Hiscock v. Varick Bank, 206 U. S. 28, 51 L. Ed. 945, 18 Am. B. R. 1, affirming *In re* Mertens (C. C. A. 2d Cir.), 144 Fed. Rep. 818, 75 C. C. A. 548, 15 Am. B. R. 362.

<sup>2</sup> Union Nat. Bank v. Neill (C. C. A. 5th Cir.), 149 Fed. Rep. 720, 79 C. C. A. 426, 17 Am. B. R. 842; Postlethwaite v. Hicks (C. C. A. 4th Cir.), 165 Fed. Rep. 897, 91 C. C. A. 575, 21 Am. B. R. 70; In re Mueller (C. C. A. 6th Cir.), 135 Fed. Rep. 711, 68 C. C. A. 349, 14 Am. B. R. 256.

<sup>3</sup> In Holden v. Stratton, 191 U. S. 115, 48 U. Ed. 116, 10 Am. B. R. 786, the Chief Justice said: "While the word 'claim' is used in its signification of the demand or assertion of a right in subd. 11 of section 2, in respect of 'all claims of bankrupts to their exemptions,' it is also used in many parts of the act, and, as we think, in section 25, as referring to debts . . . . presented for proof against estates in bankruptcy."

The clause includes claims of secured creditors as well as unsecured creditors.4

It is not a judgment allowing or rejecting a claim within the meaning of section 25a, where the claim is for services rendered or expenses incurred in the administration of the estate,<sup>5</sup> or where the amount allowed or rejected is less than \$500,<sup>6</sup> the amount involved being that for which the claim is allowed or rejected,<sup>7</sup> or a decision allowing or disallowing a claim for voting purposes, without prejudice to its subsequent presentation,<sup>8</sup> or an order setting aside an allowance of a secured claim and requiring the creditor to pay a preference,<sup>9</sup> or an order disallowing interest subsequent to the allowance of a claim.<sup>10</sup>

<sup>4</sup> Coder v. Arts, 213 U. S. 223, 53 L. Ed. 772, 22 Am. B. R. 1; In re Roche (C. C. A. 5th Cir.), 101 Fed. Rep. 956, 42 C. C. A. 115, 4 Am. B. R. 369; In re Mertens (C. C. A. 2d Cir.), 144 Fed. Rep. 818, 75 C. C. A. 548, 15 Am. B. R. 362 affirmed, in Hiscock v. Bank, 206 U. S. 28, 51 L. Ed. 945, 18 Am. B. R. 1.

Davidson v. Friedman (C. C. A. 6th Cir.), 140 Fed. Rep. 853, 72
C. C. A. 553, 15 Am. B. R. 489;
Bank of Clinton v. Kondert (C. C. A. 5th Cir.), 159 Fed. Rep. 703, 86
C. C. A. 571, 20 Am. B. R. 178;
Ohio Valley Bank Co. v. Switzer (C. C. A. 6th Cir.), 153 Fed. Rep. 362, 82
C. C. A. 438, 18 Am. B. R. 689.

<sup>6</sup> Gray v. Grand Forks Mercantile Co. (C. C. A. 8th Cir.), 138 Fed. Rep. 344, 70 C. C. A. 634, 14 Am. B. R. 780.

In Pratt v. Bothe (C. C. A. 6th Cir.), 130 Fed. Rep. 670, 65 C. C. A. 48, 12 Am. B. R. 529, an appeal was sustained for less than \$500, the question not being raised as explained in Davidson v. Friedman

(C. C. A. 6th Cir.), 140 Fed. Rep. 853, 72 C. C. A. 553, 15 Am. B. R. 489.

7 In Gray v. Grand Forks Mercantile Co. (C. C. A. 8th Cir.), 138 Fed. Rep. 344, 347, 70 C. C. A. 634, 14 Am. B. R. 780, Judge Van Deventer said: "The decree complained of does not allow or reject a debt or claim of \$500 or over. Only one debt or claim of that amount was acted upon. It was partially allowed and partially rejected, but neither the allowance nor the rejection reaches the prescribed amount. The appeal does not put in controversy the entire claim, but only what was rejected."

8 Sternbergh v. Duryea Power
Co. (C. C. A. 3d Cir.), 161 Fed.
Rep. 540, 88 C. C. A. 482, 20 Am.
B. R. 625 and 218 U. S. 299.

In re First Nat. Bank (C. C. A. 6th Cir.), 155 Fed. Rep. 100, 84
C. C. A. 16, 18 Am. B. R. 766.

Consult Livingstone v. Heineman (C. C. A. 6th Cir.), 120 Fed. Rep. 786, 57 C. C. A. 154, 10 Am. B. R. 39.

10 In re Chandler (C. C. A. 7th

Where an appeal is taken from a judgment allowing or rejecting a debt or claim of \$500 or over, the court of appeals may determine the validity of the claim and as incident thereto a lien asserted securing the debt.<sup>11</sup>

If a creditor seeks to establish title to or a lien on property of the bankrupt by intervening in the bankruptcy proceedings, without proving his claim, it is not a proceeding in bankruptcy and the judgment or decree on such intervention is not appealable under this clause, but may be reviewed under the general appellate jurisdiction of the circuit court of appeals.<sup>12</sup>

An order allowing or denying priority to a security claimed has been reviewed on petition as to matters of law, <sup>13</sup> and an appeal for this purpose dismissed. <sup>14</sup>

Where a claim is disallowed the creditor owning the claim may prosecute an appeal. Where a claim is allowed the trustee representing all of the creditors is the proper person to prosecute the appeal.<sup>15</sup> It has been held that a creditor

Cir.), 184 Fed. Rep. 887, 107 C. C. A. 209, 25 Am. B. R. 865, and 185 Fed. Rep. 1006, 107 C. C. A. 663. 11 Coder v. Arts, 213 U. S. 223, 53 L. Ed. 772, 22 Am. B. R. 1; Hutchinson v. Otis, 190 U. S. 552, 47 L. Ed. 1179, 10 Am. B. R. 135; Cunningham v. German Ins. Bank (C. C. A. 6th Cir.), 101 Fed. Rep. 977, 41 C. C. A. 609, 4 Am. B. R. 192; In re Worcester County (C. C. A. 1st Cir.), 102 Fed. Rep. 808, 42 C. C. A. 637, 4 Am. B. R. 496; Burow v. Grand Lodge, etc., (C. C. A. 5th Cir.), 133 Fed. Rep. 708, 66 C. C. A. 538, 13 Am. B. R. 542. 12 Knapp v. Milwaukee Trust Co., 216 U. S. 545, 45 L. Ed. 610, 24 Am. B. R. 761; In re Whitener (C. C. A. 5th Cir.) 105 Fed. Rep. 180, 44 C. C. A. 434, 5 Am. B. R. 198; Security Warehousing Co. v. Hand, 206 U. S. 415, 51 L. Ed. 1117, 19 Am. B. R. 291; Hewitt v. Berlin

Machine Works, 194 Fed. Rep. 296, 48 L. Ed. 986, 11 Am. B. R. 709; York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633.

But see *In re* Lee (C. C. A. 8th Cir.), 182 Fed. Rep. 579, 105 C. C. A: 117, 25 Am. B. R. 436.

13 Courier-Journal Job Printing Co. v. Schaeffer-Meyer Brewing Co. (C. C. A. 6th Cir.), 101 Fed. Rep. 699, 44 C. C. A. 614, 4 Am. B. R. 183; In re Rouse, Hazard & Co. (C. C. A. 7th Cir.), 91 Fed. Rep. 96, 33 C. C. A. 356, 1 Am. B. R. 234; In re Richards (C. C. A. 7th Cir.), 96 Fed. Rep. 935, 37 C. C. A. 634, 3 Am. B. R. 145.

<sup>14</sup> Guadette v. Graham (C. C. A.
 9th Cir.), 164 Fed. Rep. 311, 90 C.
 C. A. 243, 21 Am. B, R. 142.

15 Foreman v. Burleigh (C. C. A.
 1st Cir.), 109 Fed. Rep. 313, 48 C.
 C. A. 376, 6 Am. B. R. 230; Living-

may appeal from the allowance of a claim of another creditor in case the trustee refuses to appeal. A better practice is for the dissatisfied creditor to procure an order of the court of bankruptcy to either direct an appeal by the trustee or permit the creditor to appeal in the name of the trustee. The creditor to appeal in the name of the trustee.

# § 826. Appeals and writs of error in controversies arising in bankruptcy.

The circuit courts of appeals have "appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy over which they have appellate jurisdiction in other cases." <sup>1</sup>

It may be said generally that controversies embrace independent suits at law and in equity growing out of the settlement of bankrupt estates; interventions to assert title to or a lien on the property in the possession of the trustee, thereby raising a distinct and separable issue; and trials by

stone v. Heineman (C. C. A. 6th Cir.), 120 Fed. Rep. 786, 57 C. C. A. 154, 10 Am. B. R. 39; Chatfield v. O'Dwyer (C. C. A. 8th Cir.), 101 Fed. Rep. 797, 42 C. C. A. 30, 4 Am. B. R. 313,

16 In re Roche (C. C. A. 5th Cir.),
101 Fed. Rep. 956, 42 C. C. A. 115,
4 Am. B. R. 369; McDaniel v.
Stroud (C. C. A. 4th Cir.), 106 Fed.
Rep. 486, 45 C. C. A. 446, 5 Am. B.
R. 685; Ohio Valley Bank v. Mack
(C. C. A. 6th Cir.), 163 Fed. Rep.
155, 89 C. C. A. 605, 20 Am. B. R.
919; In re Roadarmour (C. C. A. 6th Cir.), 177 Fed. Rep. 379, 100 C.
C. A. 611, 24 Am. B. R. 49.

<sup>17</sup> Chatfield v. O'Dwyer (C. C. A. 8th Cir.), 101 Fed. Rep. 797, 42 C. C. A. 30, 4 Am. B. R. 313. See also McDaniel v. Stroud (C. C. A. 4th Cir.), 106 Fed. Rep. 486 45 C. C. A. 446, 5 Am. B. R. 685.

<sup>1</sup> B. A. 1898, Sec. 24a. Sec. 130 of the judicial code (Act of March 3, 1911, 36 Stat. at L. 1087) provides that the circuit courts of appeals shall have appellate and supervisory jurisdiction conferred upon them by the bankruptcy act and shall exercise the same in the manner therein prescribed.

<sup>2</sup> Bardes v. Hawarden Bank, 175 U. S. 526, 44 L. Ed. 261, 3 Am. B. R. 680; and 178 U. S. 524, 44 L. Ed. 1175, 4 Am. B. R. 163; Doroshow v. Ott (C. C. A. 3d Cir.), 134 Fed. Rep. 740, 67 C. C. A. 644, 14 Am. B. R. 34.

<sup>8</sup> Hewit v. Berlin Mach. Wks., 194
U. S. 296, 48 L. Ed. 986, 11 Am. B.
R. 709; Knapp v. Milwaukee Trust
Co., 216 U. S. 545, 54 L. Ed. 610,
24 Am. B. R. 761; Security Warehousing Co. v. Hand, 206 U. S.
415, 51 L. Ed. 1117, 19 Am. B. R. 291.

jury in bankruptcy proceedings.<sup>4</sup> Controversies of this kind are not proceedings in bankruptcy. What constitutes a controversy is discussed at length in another place.<sup>5</sup>

Judgments and decrees in such cases are revised by the appellate courts as before the passage of the act.<sup>6</sup> The statute regulating the appellate jurisdiction is found in the judicial code,<sup>7</sup> reenacting sections 5 and 6 of the act creating the circuit courts of appeals and distributing the jurisdiction between the supreme court and the new courts created.<sup>8</sup>

Section 128 of the judicial code provides that "The circuit courts of appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the district courts, including the United States district court for Hawaii, in all cases other than those in which appeals and writs of error may be taken direct to the supreme court; as provided in section two hundred and thirty-eight, unless otherwise provided by law."

It will be observed that the circuit courts of appeals may review the final decision of the district court in any case not within the appellate jurisdiction of the supreme court. The circuit court of appeals has no jurisdiction to review decisions in cases which go direct to the supreme court unless the case

<sup>&</sup>lt;sup>4</sup> See Sec. 830, *post.* Grant Shoe Co. v. Laird, 203 U. S. 502, 51 L. Ed. 292, 17 Am. B. R. 1; Elliotte v: Toeppner, 187 U. S. 327, 47 L. Ed. 200, 9 Am. B. R. 50.

<sup>&</sup>lt;sup>5</sup> See Sec. 827, post.

<sup>6</sup> B. A. 1898, Sec. 24a. Bardes v. Hawarden Bank, 175 U. S. 526, 44 L. Ed. 261, 3 Am. B. R. 680, 178 U. S. 524, 44 L. Ed. 1175, 4 Am. B. R. 163; Hewit v. Berlin Machine Works, 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709; Scott v. Wilson (C. C. A. 7th Cir.), 115 Fed. Rep. 284, 53 C. C. A. 76, 8 Am. B. R. 349; Stelling v. Jones Lumber Co. (C. C. A. 7th Cir.), 116 Fed. Rep. 261, 53 C. C. A. 81,

<sup>8</sup> Am. B. R. 521; Booneville Nat. Bank v. Blakey (C. C. A. 7th Cir.), 107 Fed. Rep. 891, 47 C. C. A. 43, 6 Am. B. R. 13; Steele v. Buel (C. C. A. 8th Cir.), 104 Fed. Rep. 968, 44 C. C. A. 287, 5 Am. B. R. 165; Burleigh v. Foreman (C. C. A. 1st Cir.), 125 Fed. Rep. 217, 60 C. C. A. 109, 11 Am. B. R. 74.

<sup>&</sup>lt;sup>7</sup> Secs. 128 to 135 of the judicial code regulating the jurisdiction of the circuit courts of appeals and Secs. 233 et seq., regulating the jurisdiction of the supreme court (Act of March 3, 1911, 36 Stat. at L. 1087).

<sup>&</sup>lt;sup>8</sup> Act of March 3, 1891, 26 Stat. at L. 826.

is also brought within the provisions of section 128 of the code. In such cases the defeated party may take it to either court for review.9

Section 238 of the judicial code reenacting section 5 of the act of 1891,<sup>10</sup> provides that "Appeals and writs of error may be taken from the district court, including the United States district court for Hawaii, direct to the supreme court in the following cases: In any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified to the supreme court from the court below for decision; from the final sentences and decrees in prize causes; in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority is drawn in question; and in any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States."

# § 827. Controversies arising in bankruptcy.

By such controversies are meant controversies arising in bankruptcy proceedings in the exercise by the courts of bankruptcy of the jurisdiction vested in them at law and in equity by section 2, to settle the estates of bankrupts and to determine controversies in relation thereto.<sup>1</sup>

A controversy arising in bankruptcy is usually presented by a contest between the trustee and a third person with respect to some right, title or interest in property claimed to belong to the estate. Such contests do not in every instance present a controversy arising in bankruptcy.<sup>2</sup>

<sup>9</sup> Sec. 154 Loveland's Appellate Jurisdiction of the Federal Courts and cases cited at note 8.

<sup>10</sup> Act of March 3, 1891, 26 Stat. at L. 826.

<sup>1</sup> Hewit v. Berlin Mach. Wks., 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709; Burleigh v. Foreman (C. C. A. 1st Cir.), 125 Fed. Rep. 217, 60 C. C. A. 109, 11 Am. B. R. 74.

<sup>2</sup> See Sec. 26, ante, for the distinction between bankruptcy proceedings and controversies arising in bankruptcy generally.

When an issue is raised between the parties involving substantial rights and which might arise at common law or in equity, the case presents a controversy within the meaning of section 24a.<sup>3</sup> Such controversies may be independent suits at law or in equity growing out of the settlement of the estate; or interventions in the bankruptcy proceedings, which raise a distinct and separable issue; or a jury trial demanded under section 19 of the act as will be pointed out in the next sections.

In order to be reviewable in a circuit court of appeals under section 24a of the act, the proceedings in the court below must be in the nature of a plenary action. The final judgment or decree in such cases may be reviewed on appeal or writ of error as a controversy arising in bankruptcy, but can not be revised on petition.

A summary order by a court of bankruptcy on a rule to show cause is not such a controversy, although the cause of action is clearly one at law or in equity. Such orders may be reviewed and corrected on petition to revise as to matters of law under section 24b, but not on appeal or writ of error.<sup>6</sup>

# § 828. Independent suits as controversies within section 24a.

An independent suit at law or in equity growing out of the settlement of a bankrupt estate is a controversy arising

<sup>3</sup> Mason v. Wolkowich (C. C. A. 1st Cir.), 150 Fed. Rep. 699, 80 C. C. A. 435, 17 Am. B. R. 709; Burleigh v. Foreman (C. C. A. 1st Cir.), 125 Fed. Rep. 217, 60 C. C. A. 109, 11 Am. B. R. 74; Thomas v. Woods (C. C. A. 8th Cir.), 173 Fed. Rep. 585, 97 C. C. A. 535, 23 Am. B. R. 132.

<sup>4</sup> Hewit v. Berlin Mach. Wks., 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709; *In re* Mueller (C. C. A. 6th Cir.), 135 Fed. Rep. 711, 68 C. C. A. 349, 14 Am. B. R. 256; Smith v. Means (C. C. A. 7th Cir.), 148

Fed. Rep. 89, 78 C. C. A. 10; Elliott v. Toeppner, 187 U. S. 327, 47 L. Ed. 200, 9 Am. B. R. 50; Sterling v. Jones Lumber Co. (C. C. A. 7th Cir.), 116 Fed. Rep. 261, 53 C. C. A. 81, 8 Am. B. R. 521.

<sup>5</sup> See Sec. 814, ante.

<sup>6</sup> Louisville Trust Co. v. Comingor, 184 U. S. 18, 46 L. Ed. 413, 7 Am. B. R. 421; Schweer v. Brown, 195 U. S. 171, 49 L. Ed. 144; First Nat. Bank v. Title & Trust Co., 198 U. S. 280, 49 L. Ed. 1051, 14 Am. B. R. 102.

in bankruptcy within the meaning of section 24a of the act.1

Such are actions at law for the specific recovery of personal property; <sup>2</sup> or a suit in equity by a trustee to set aside transfers in fraud of creditors and recover the property for the estate; <sup>3</sup> or a suit to set aside a preference and recover the property, <sup>4</sup> or a bill in equity to enjoin the prosecution of a suit, <sup>5</sup> or to enjoin a person from interfering with the possession by the trustee or property claimed by both parties; <sup>6</sup> or a judgment of commitment for a criminal contempt; <sup>7</sup> or an independent plenary suit to enforce liens and right of possession upon property in the possession of the trustee; <sup>8</sup> or an action by a third person to recover property in the possession of the receiver of a bankrupt; <sup>9</sup> or a suit

<sup>1</sup> Thomas v. Sugarman, 218 U. S. ·129; Delta Nat Bank v. Easterbrook (C. C. A. 5th Cir.), 133 Fed. Rep. 521, 67 C. C. A. 236, 13 Am. B. R, 338; Scott & Co. v. Wilson (C. C. A. 7th Cir.), 115 Fed. Rep. 284, 53 C. C. A. 76, 8 Am. B. R. 349; Doroshow v. Ott (C. C. A. 3d Cir.), 134 Fed. Rep. 740, 67 C. C. A 644, 14 Am. B. R. 34; Security Warehousing Co. v. Hand (C. C. A. 7th Cir.), 143 Fed. Rep. 32, 77 C. C. A. 186. 16 Am. B. R. 49; and 206 U. S. 415, 51 L. Ed. 1117, 19 Am. B. R. 291; In re Jacobs (C. C. A. 8th Cir.), 99 Fed. Rep. 539, 39 C. C. A. 647, 3 Am. B. R. 671; Morehouse v. Pacific Hdwe, Co. (C. C. A. 9th Cir.), 177 Fed. Rep. 337, 100 C. C. A. 647, 24 Am. B. R. 178.

<sup>2</sup> Delta Nat. Bank v. Easterbrook (C. C. A. 5th Cir.), 133 Fed. Rep. 521, 67 C. C. A. 236, 13 Am. B. R. 338, writ of *certiorari* denied 200 U. S. 620, 50 L. Ed. 624.

Thomas v. Sugarman, 218 U. S.
129; Doroshow v. Ott (C. C. A. 3d
Cir.), 134 Fed. Rep. 740, 67 C. C.
A. 644, 14 Am. B. R. 34; In re
Jacobs (C. C. A. 8th Cir.), 99 Fed.

Rep. 539, 39 C. C. A. 647, 3 Am. B. R. 671.

<sup>4</sup> Boonville Nat. Bank v. Blakey (C. C. A. 7th Cir.), 107 Fed. Rep. 891, 47 C. C. A. 43, 6 Am. B. R. 13. <sup>5</sup> Doroshow v. Ott (C. C. A. 3d Cir.), 134 Fed. Rep. 740, 67 C. C. A. 644, 14 Am. B. R. 34.

<sup>6</sup> Sterling v. Jones Lumber Co.
(C. C. A. 7th Cir.), 116 Fed. Rep. 261, 53 C. C. A. 81, 8 Am. B. R. 521; In re Rusch (C. C. A. 7th Cir.), 116 Fed. Rep. 270, 53 C. C. A. 631, 8 Am. B. R. 518.

<sup>7</sup> Morehouse v. Pacific Hdwe Co. (C. C. A. 9th Cir.), 177 Fed. Rep. 337, 100 C. C. A. 647, 24 Am. B. R. 178.

As to reviewing orders committing persons for contempt generally see Sec. 686, post.

8 Security Warehousing Co. v.
Hand (C. C. A. 7th Cir.), 143 Fed.
Rep. 32, 74 C. C. A. 186, 16 Am. B.
R. 49, and 206 U. S. 415, 51 L. Ed.
1117, 19 Am. B. R. 291.

<sup>9</sup> Walter Scott & Co. v. Wilson (C. C. A. 7th Cir.), 115 Fed. Rep. 284, 53 C. C. A. 76, 8 Am. B. R. 349. against parties claiming possession of goods in the bankrupt's store, as warehousemen, under a lease of the store. 10

A final judgment or decree in such suits may be reviewed by a circuit court of appeals on writ of error or appeal in the exercise of its general appellate jurisdiction.<sup>11</sup>

#### § 829. Intervening petitions as controversies within Sec. 24a.

An intervention by a third party, by petition or otherwise, in the bankruptcy proceedings in which a separable and distinct issue is made and tried on pleadings and proofs is a controversy arising in bankruptcy.<sup>1</sup> When such an issue is raised between the parties intervening and the trustee, involve substantial rights, and which might arise at common law or in equity, the case presents a controversy within the meaning of section 24a.<sup>2</sup>

A controversy of this kind arises where a third party intervenes in the bankruptcy proceedings to assert title to property in the possession of the trustee; <sup>3</sup> or to enforce a mortgage lien upon the property in the possession of the trustee as a part of the bankrupt estate; <sup>4</sup> or by a vendor to recover specific property in the possession of the trustee under a conditional sale contract retaining title in the

<sup>10</sup> Whitney v. Wenman, 198 U. S. 539, 49 L. Ed. 1157, 14 Am. B. R. 45, was treated as a controversy appealable direct to the supreme court under Section 5, clause 1 of the Act of March 3, 1891, 26 Stat. at L. 826.

<sup>11</sup> B. A. 1898, Sec. 24 a. Sec. 128

<sup>11</sup> B. A. 1898, Sec. 24 a. Sec. 128 of the Judicial Code of 1911, Act of March 3, 1911, 36 Stat. at L. 1087.

March 3, 1911, 36 Stat. at L. 1087.

<sup>1</sup> Knapp v. Milwaukee Trust Co., 216 U. S. 545, 54 L. Ed. 610, 24 Am. B. R. 761; York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633; Hewit v. Berlin Mach. Wks., 194 U. S. 296, 48 L. Ed. 986, 11 Am. B R. 709; Burleigh v. Foreman (C. C. A. 1st Cir.), 125 Fed. Rep. 217, 60 C. C. A. 109, 11 Am. B. R. 74; Hinds v. Moore (C. C. A. 6th Cir.), 134 Fed. Rep. 221, 67 C. C. A. 149, 14 Am. B. R. 1;

*In re* Mueller (C. C. A. 6th Cir.), 135 Fed. Rep. 711, 68 C. C. A. 349, 14 Am. B. R. 256.

<sup>2</sup> Mason v. Wolkowich (C. C. A. 1st Cir.), 150 Fed. Rep. 699, 80 C. C. A. 435, 17 Am. B. R. 709; Burleigh v. Foreman (C. C. A. 1st Cir.), 125 Fed. Rep. 217, 60 C. C. A. 109, 11 Am. B. R. 74; Thomas v. Woods (C. C. A. 8th Cir.), 173 Fed. Rep. 585, 97 C. C. A. 535, 23 Am. B. R. 132.

<sup>3</sup> Hewit v. Berlin Mach. Wks., 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709.

But see *In re* Whitener (C. C. A. 5th Cir.), 105 Fed. Rep. 180, 44 C. C. A. 434, 5 Am. B. R. 198.

<sup>4</sup> Knapp v. Milwaukee Trust Co., 216 U. S. 545, 54 L. Ed. 610, 24 Am. B. R. 761; *In re* First Nat, Bank vendor; <sup>5</sup> or a proceeding to marshal assets in the hands of a trustee as between partnership and individual creditors; <sup>6</sup> or where a lessor claims property under a lease with the bankrupt upon confirmation of a composition.<sup>7</sup>

A petition of a trustee filed in the bankruptcy court presenting a controversy of a character justiciable in other courts is a controversy within the meaning of section 24a of the act. Such are petitions to have certain adverse claims and liens on property of the estate declared void and for a sale of the property free of liens; or to compel payment to him of the proceeds of an unauthorized sale of the assets of the bankrupt; or attacking a mortgage on property of the bankrupt in his possession as a preference.

An intervention is a proceeding in equity. A final decree in such proceedings may be reviewed on appeal by the circuit court of appeals in the exercise of its general appellate jurisdiction.<sup>12</sup>

(C. C. A. 6th Cir.), 135 Fed. Rep. 62, 67 C. C. A. 536, 14 Am. B. R. 180; Dodge v. Norlin (C. C. A. 8th Cir.), 133 Fed. Rep. 363, 66 C. C. A. 425, 13 Am. B. R. 176; Liddon & Bro. v. Smith (C. C. A. 5th Cir.), 135 Fed. Rep. 43, 67 C. C. A. 517, 14 Am. B. R. 204.

But see *In re* Antigo Screen Door Co. (C. C. A. 7th Cir.), 123 Fed. Rep. 249, 59 C. C. A. 248, 10 Am. B. R. 539.

Dolle v. Cassell (C. C. A. 6th Cir.), 135 Fed. Rep. 52, 67 C. C. A. 526, 14 Am. B. R. 52, on appeal York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L, Ed. 782, 15 Am. B. R. 633.

Burleigh v. Foreman (C. C. A.
1st Cir.), 125 Fed. Rep. 217, 60 C.
C. A. 109, 11 Am. B. R. 74.

<sup>7</sup> In re Winship (C. C. A. 7th Cir.), 120 Fed. Rep. 93, 56 C. C. A. 45, 9 Am. B. R. 638.

8 Mason v. Wolkowich (C. C. A. Ist Cir.), 150 Fed. Rep. 699, 80 C.
C. A. 435, 17 Am. B. R. 709;
Thomas v. Woods (C. C. A. 8th.

Cir.), 173 Fed. Rep. 585, 97 C. C. A. 535, 23 Am. B. R. 132; Lozier v. Savings Bank & Trust Co. (C. C. A. 6th Cir.), 163 Fed. Rep. 212, 89 C. C. A. 642, 20 Am. B. R. 845.

<sup>9</sup> Thomas v. Woods (C. C. A. 8th Cir.), 173 Fed. Rep. 585, 97 C. C. A. 535, 23 Am. B. R. 132.

Mason v. Wolkowich (C. C.
 A. 1st Cir.),150 Fed. Rep. 699, 80
 C. C. A. 435, 17 Am. B. R. 709.

<sup>11</sup> Lozier v. Savings Bank & T. Co. (C. C. A. 6th Cir.), 163 Fed. Rep. 212, 89 C. C. A. 642, 20 Am. B. R. 845.

12 B. A. 1898, Sec. 24a. Sec. 128 of the Judicial Code of 1911, Act of March 3, 1911, 36 Stat. at L. 1087. Hewit v. Berlin Machine Works 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R: 709; In re First National Bank (C. C. A. 6th Cir.), 135 Fed. Rep. 62, 67 C. C. A. 536, 14 Am. B. R. 180; Mason v. Wolkowich (C. C. A. 1st Cir.), 150 Fed. Rep. 699, 80 C. C. A. 435, 17 Am. B. R. 709.

But where it becomes necessary, as incident to a step in bankruptcy, to determine the title or interest of third parties, who may be brought in for that purpose, it is not a controversy arising in bankrupcy, but continues to be a proceeding in bankruptcy proper.<sup>13</sup>

Such is a petition by a trustee for an order to sell real estate and bring in third persons claiming liens thereon; 14 or where a creditor proves his claim asserting a security for his debt; 15 or where in determining the priority of claims the validity of a trust deed is drawn in question, the debt not being disputed. 16

A judgment or order in such proceedings may be reviewed by the circuit court of appeals on petition for revision or an appeal in bankruptcy, according to the nature of the proceeding.<sup>17</sup>

# § 830. Jury trials as controversies within Section 24a.

A trial by jury in a bankruptcy proceeding under section 19 of the act is a controversy arising in bankruptcy within the meaning of section 24a.<sup>1</sup>

18 Coder v. Arts, 213 U. S. 223, 53
L. Ed. 772, 22 Am. B. R. 1; In re McMahon (C. C. A. 6th Cir.), 147
Fed. Rep. 685, 77 C. C. A. 668, 17
Am. B. R. 530; Morgan v. First
Nat. Bank (C. C. A. 4th Cir.), 145
Fed. Rep. 466, 76 C. C. A. 236, 16
Am. B. R. 639.

14 In re McMahon (C. C. A. 6th Cir.), 147 Fed. Rep. 685, 77 C. C. A. 668, 17 Am. B. R. 530; Schuler v. Hassinger (C. C. A. 5th Cir.), 177 Fed. Rep. 119, 100 C. C. A. 539, 24 Am. B. R. 184.

18 Coder v. Arts, 213 U. S. 223,
53 L. Ed. 772, 22 Am. B. R. 1;
Cunningham v. German Ins. Bank
(C. C. A. 6th Cir.), 101 Fed. Rep.
977, 41 C. C. A. 609, 4 Am. B. R.
192; Burow v. Grand Lodge (C. C.
A. 5th Cir.), 133 Fed. Rep. 708, 66
C. C. A. 538, 13 Am. B. R. 542.

16 Morgan v. First Nat. Bank (C. C. A. 4th Cir.), 145 Fed. Rep. 466, 76 C. C. A. 236, 16 Am. B. R. 639; In re Rouse, Hazard & Co. (C. C. A. 7th Cir.), 91 Fed. Rep. 96, 33 C. C. A. 356, 1 Am. B. R. 234; Courier-Journal Job Printing Co. v. Schaefer-Meyer Brewing Co. (C. C. A. 6th Cir.), 101 Fed. Rep. 699, 41 C. C. A. 614, 4 Am. B. R. 183; In re Worcester County (C. C. A. 1st Cir.), 102 Fed. Rep. 808, 42 C. C. A. 637, 4 Am B. R. 496.

<sup>17</sup> As to revisory jurisdiction see Sec. 810, ante. B. A. 1898, Sec. 24b. As to appeals in bankruptcy, see Sec. 822, ante. B. A. 1898, Sec. 25a.

<sup>1</sup> Elliott v Toeppner, 187 U. S. 327, 47 L. Ed. 200, 9 Am. B. R. 50; Duncan v. Landis (C. C. A. 3d Cir.), 106 Fed. Rep. 839, 45 C. C.

The right to trial by jury granted by the bankrupt act on demand is absolute, and means a trial by jury according to the established practice in courts of common law.<sup>2</sup> It is a suit at law independent of and separate from the proceedings in bankruptcy. The final judgment may be reviewed by a circuit court of appeals in the exercise of its general appellate jurisdiction.<sup>3</sup>

It is settled that rulings made during the course of a trial by jury under section 19 in a bankruptcy proceeding can be reviewed only on writ of error. But where a person waives his statutory right to a jury trial, by failing to apply for a jury in writing, and the issues are submitted to a jury, the verdict returned is advisory as in equity. The decree of the trial court in such cases may be reviewed on appeal.

# § 831. Method of reviewing decisions in controversies arising in bankruptcy.

The manner of proceeding to obtain a review of a decree or a judgment in a controversy arising in bankruptcy proceedings and the practice in respect thereto is not changed or affected by the bankruptcy statute. Only final judgments and decrees in such controversies are reviewable. A decree

A. 666, 5 Am. B. R. 649; Grant Shoe Co. v. Laird, 212 U. S. 445, 53 L. Ed. 591, 21 Am. B. R. 484.

<sup>2</sup> Elliott v. Toeppner, 187 U. S. 327, 47 L. Ed. 200, 9 Am. B. R. 50; Duncan v. Landis (C. C. A. 3d Cir.), 106 Fed. Rep. 839, 45 C. C. A. 666, 5 Am. B. R. 649.

<sup>8</sup> B. A. 1898, Sec. 24a. Sec. 128 of the Judicial Code of 1911, Act of March 3, 1911, 36 Stat. at L. 1087.

Duncan v. Landis (C. C. A. 3d Cir.), 106 Fed. Rep. 839, 45 C. C. A. 666, 5 Am. B. R. 649.

<sup>4</sup> Grant Shoe Co. v. Laird, 203 U. S. 502, 51 L. Ed. 292, 17 Am. B. R. 1; and 212 U. S. 445, 53 L. Ed. 591, 21 Am. B. R. 484; Elliott v. Toeppner, 187 U. S. 327, 47 L. Ed. 200, 9 Am. B. R. 50; Duncan v. Landis (C. C. A. 3d Cir.), 106 Fed. R. 649; Bower v. Holzworth (C. C. A. 8th Cir.), 138 Fed. Rep. 28, 70 C C. A. 396, 15 Am. B. R. 22; In re Neasmith (C. C. A. 6th Cir.), 147 Fed. Rep. 160; Ins. Co. v. Comstock, 16 Wall. 258, 21 L. Ed. 493; Lennox v. Allen-Lane Co. (C. C. A. 1st Cir.), 167 Fed. Rep. 114, 92 C. C. A. 566, 21 Am. B. R. 648.

<sup>6</sup> In re Neasmith (C. C. A. 6th Cir.), 147 Fed. Rep. 160, 77 C. C. A. 402, 17 Am. B. R. 128; Oil Well Supply Co. v. Hall (C. C. A. 4th Cir.), 128 Fed. Rep. 875, 63 C. C. A. 343, 11 Am. B. R. 738.

Bardes v. Hawarden Nat. Bank,
175 U. S. 526, 44 L. Ed. 261, 3 Am.
B. R. 680, 178 U. S. 524, 44 L. Ed.
1175, 4 Am. B. R 163; Hewit v.
Berlin Mach. Wks., 194 U. S. 296,
48 L. Ed. 986, 11 Am. B. R. 709.

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in equity can be reviewed only by appeal and a judgment at law only on writ of error.<sup>3</sup> An intervention is a proceeding in equity and reviewable on appeal.<sup>3\*</sup>

The time within which an appeal or writ of error may be sued out in this class of cases is six months from the entry of the decree or judgment sought to be reviewed,<sup>4</sup> except from an interlocutory order or decree in equity granting or continuing, refusing or dissolving an injunction or appointing a receiver when it must be taken within thirty days from the entry of such order or decree.<sup>5</sup> An order granting or continuing an injunction or appointing a receiver in bankruptcy proceedings is not reviewable under this provision.<sup>6</sup>

In proceedings in equity instituted for the purpose of carrying into effect the provisions of the act or enforcing the rights and remedies given by it, the rules of equity procedure established by the supreme court of the United States must be followed as nearly as may be.<sup>7</sup>

In proceedings at law instituted for the same purpose, the practice and procedure in cases at law shall be followed as nearly as may be.<sup>7</sup>

Judgments and decrees of a territorial court in such cases may be reviewed by the supreme court of the territory.8

175 U. S. 526, 44 L. Ed. 261, 3 Am. B. R. 680.

<sup>8</sup> Delta Nat. Bank v. Easterbrook (C. C. A. 5th Cir.), 133 Fed. Rep. 521, 67 C. C. A. 236, 13 Am. B. R. 338. See also Loveland's Appellate Juris., Secs. 22, 23 and 24.

3\* Hewit v. Berlin Mach. Wks. 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709; In re First Nat. Bank (C. C. A. 6th Cir.), 135 Fed. Rep. 62, 67 C. C. A. 536, 14 Am. B. R. 180; Mason v. Wolkowich (C. C. A. 1st Cir.), 150 Fed. Rep. 699, 80 C. C. A. 435, 17 Am. B. R. 709.

<sup>4</sup> Act of March 3, 1891, Sec. 11, 26 Stat. at L. 826; *In rc* Mueller (C. C. A. 6th Cir.), 135 Fed. Rep. 711, 68 C. C. A. 349, 14 Am. B. R. 256. See also Sec. 832, post.

• Act of March 3, 1891, Sec. 7, as amended by Sec. 129 of the Judicial Code, Act of March 3, 1911, 36 Stat. at L. 1087: See also Loveland's Appellate Juris., Chap. XII.

<sup>6</sup> O'Dell v. Boyden (C. C. A. 6th Cir.), 150 Fed. Rep. 731, 80 C. C. A. 397, 17 Am. B. R. 751.

<sup>7</sup> Gen. Ord. 36.

As to the practice in obtaining a review of a proceeding at law and in equity in the appellate courts of the United States, see Loveland's Appellate Juris., Chapters III and IV; rules of the circuit courts of appeals and of the supreme court; Loveland's Forms Fed. Prac., Nos. 1308 to 1512, and notes thereto.

8 Plymouth Cordage Co. v. Smith, 194 U. S. 311, 48 L. Ed. 992.

## § 832. Time limit for appeals and writs of error.

An appeal or writ of error under section 24a to review a final judgment at law or a final decree in equity in a controversy arising in bankruptcy proceedings must be sued out within six months from the entry of such decree or judgment.<sup>1</sup>

A writ of error to review a jury trial in bankruptcy is a controversy within the meaning of section 24a, and therefore may be prosecuted any time within six months after the judgment.<sup>2</sup>

An appeal from an interlocutory order or decree granting, continuing, refusing or dissolving an injunction or appointing a receiver, must be taken within thirty days from the entry of such order or decree.<sup>3</sup>

An appeal under section 25a to review a judgment in bankruptcy proceedings must be taken within ten days after the judgment appealed from has been rendered.<sup>4</sup>

The time begins to run in the case of an appeal or writ of error sued out under section 24a from the entry of such judgment or decree or order.<sup>5</sup> This has been held to mean

'1 Act of March 3, 1891, Sec. 11, 26 Stat. at L. 826. Steele v. Buel (C. C. A. 8th Cir.), 104 Fed. Rep. 968, 44 C. C. A. 287, 5 Am. B. R. 165; Thomas v. Sugarman, 218 U. S. 129; In re Mueller (C. C. A. 6th Cir.), 135 Fed. Rep. 711, 68 C. C. A. 349, 14 Am. B. R. 256; Boonville Nat. Bank v. Blakey (C. C. A. 7th Cir.), 107 Fed. Rep. 891, 47 C. C. A. 43, 6 Am. B. R. 13.

<sup>2</sup> See Sec. 830, ante. Grant Shoe Co. v. Laird, 212 U. S. 445, 53 L. Ed. 591, 21 Am. B. R. 484; Duncan v. Landis (C. C. A. 3d Cir.), 106 Fed. Rep. 839, 45 C. C. A. 666, 5 Am. B. R. 649.

<sup>8</sup> Act of March 3, 1891, Sec. 7, as amended by Sec. 129 of the Judicial Code, Act of March 3, 1911, 36 Stat. at L. 1087.

4 B. A. 1898, Sec. 25a. In re Mc-Call (C. C. A. 6th Cir.), 145 Fed. Rep. 898, 76 C. C. A. 430, 16 Am. B. R. 670; Thompson v. Mauzy (C. C. A. 4th Cir.), 174 Fed. Rep. 611, 98 C. C. A. 457, 23 Am. B. R. 489; Norcross v. Mercantile Co. (C. C. A, 8th Cir.), 101 Fed. Rep. 796, 41 C. C. A. 669, 4 Am. B. R. 317; Peterson v. Nash Bros. (C. C. A. 8th Cir.), 112 Fed. Rep. 311, 50 C. C. A. 260, 7 Am. B. R. 181; In re Good (C C. A. 8th Cir.), 99 Fed. Rep. 389, 39 C. C. A. 581, 3 Am. B. R. 605; In re Alden Electric Co. (C. C. A. 7th Cir.), 123 Fed. Rep. 415, 59 C. C. A. 509, 10 Am. B. R. 370.

<sup>5</sup> R. S. Sec. 1008; Sec. 7 of the act of March 3, 1891, 26 Stat. at L. 826.

the date the decree is signed by the judge or actually entered on the records of the court.6

An appeal to review a judgment in bankruptcy under section 25a must be taken "within ten days after the judgment appealed from has been rendered." The general rule is that where the time begins to run from the rendition of the judgment or decree it means the date of the decision of the court and not the date of its subsequent entry on the journal or signing by the judge. There are, however, some cases which hold that a decree or judgment is not "rendered" until it is entered on the journal of the court. It has not been decided whether the time limit in appeals in bankruptcy begins to run from the date of the decision or from the date of the entry of the judgment.

It is not competent to contradict or explain the recital of the record with reference to the date of rendition or entry of a judgment by evidence *de hors* the record.<sup>10</sup> If the date appearing in the record is erroneous the correction should be made upon application to the court below.<sup>11</sup>

In computing this time the number of days are computed by excluding the first and including the last, unless the last fall on a Sunday or a holiday, in which event the day last

<sup>6</sup> In re McCall (C. C. A. 6th Cir.), 145 Fed. Rep. 898, 76 C. C. A. 430, 16 Am. B. R. 670; Silsby v. Foote, 20 How. 290, 15 L. Ed. 822; Boise County v. Gorman. 19 Wall, 662, 22 L. Ed. 226; Polles v. Black River Co., 113 U. S. 81, 28 L. Ed. 938.

<sup>7</sup> In re McCall (C. C. A. 6th Cir.), 145 Fed. Rep. 898, 76 C. C. A. 430, 16 Am. B. R. 670; 2 Ency. of Pl. & Pr. 294 et seq., where the cases are collected.

8 Humphrey v. Havens, 9 Minn.
301; Exley v. Berryhill, 36 Minn.
117; In re Elkind (C. C. A. 2d Cir.),
175 Fed. Rep. 64, 99 C. C. A. 86,
23 Am. B. R. 166.

<sup>9</sup> In re McCall, 145 Fed. Rep. 898, 76 C. C. A. 430, 16 Am. B. R. 670, the circuit court of appeals for the sixth circuit states the distinction without deciding it.

In re Elkind (C. C. A. 2d Cir.), 175 Fed. Rep. 64, 99 C. C. A. 86, 23 Am. B. R. 166, it was held that the appeal lay to the order and not to the opinion of the court.

<sup>10</sup> In re McCall (C. C. A. 6th Cir.), 145 Fed. Rep. 898, 76 C. C. A. 430, 16 Am. B. R. 670.

<sup>11</sup> The Alaska, 35 Fed. Rep. 555,
557; In re McCall (C. C. A. 6th Cir.), 145 Fed. Rep. 898, 76 C. C. A. 430, 16 Am. B. R. 670.

included shall be the next day thereafter which is not a Sunday or a legal holiday.<sup>12</sup> The word "holiday" includes Christmas, the fourth of July, the twenty-second of February and any day appointed by the President of the United States or the congress of the United States as a holiday or as a day of pubic fasting or thanksgiving.<sup>18</sup> In computing this time Sundays and holidays are counted, except when the last day would fall on Sunday or a holiday.<sup>14</sup>

An appeal in bankruptcy lies only from a final judgment.<sup>15</sup> Only final decrees and judgments in controversies arising in bankruptcy can be reviewed on writ of error or appeal,<sup>16</sup> except interlocutory orders granting an injunction or appointing a receiver, which is an exception provided by statute.

The time within which an appeal may be taken does not run pending a petition for rehearing because a final judgment is not entered until the petition for rehearing is disposed of.<sup>17</sup> But where a petition for rehearing is not filed until the time for appeal has expired the right of appeal is lost and can not be revived by filing a petition for rehearing.<sup>18</sup> When a judgment is amended the time begins to run from the amendment.<sup>19</sup> When a rehearing is granted and a judgment entered thereon the time begins to run from date of the last judgment.<sup>20</sup> A rehearing may be granted in a proper case for the purpose of giving a dissatisfied litigant the right to

12 B. A. 1898, Sec. 31.

<sup>18</sup> B. A. 1898, Sec. 1, clause 14.

<sup>14</sup> York's Case, No. 18139 Fed. Cas., 1 Abb. (U. S.) 503.

15 Goodman v. Brenner (C. C. A.
5th Cir.), 109 Fed. Rep. 481, 48 C.
C. A. 516, 6 Am. B. R. 470.

<sup>16</sup> Bardes v. Hawarden Bank, 175
U. S. 526, 44 L. Ed. 261, 3 Am. B. R.
680, 178 U. S. 524, 44 L. Ed. 1175,
4 Am. B. R. 163.

<sup>17</sup> Kingman v. Western Mfg. Co.,
 170 U. S. 675, 42 L. Ed. 1192.

<sup>18</sup> Conboy v. First Nat. Bank, 203
 U. S. 141, 51 L. Ed. 128, 16 Am. B.

R. 773; Brady v. Bernard & Kittinger (C. C. A. 6th Cir.), 170 Fed. Rep. 576, 95 C. C. A. 656, 22 Am. B. R. 342, and 217 U. S. 595, 54 L. Ed. 896; Morgan v. Benedum (C. C. A. 4th Cir.), 157 Fed. Rep. 232, 84 C. C. A. 675, 19 Am. B. R. 601; In re Goldberg (C. C. A. 2d Cir.), 167 Fed. Rep. 808, 93 C. C. A. 203, 21 Am. B. R. 828.

<sup>19</sup> United States v. Gomez, 1 Wall. 690, 17 L. Ed. 677.

20 In re Worcester County (C. C. A. 1st Cir.), 102 Fed. Rep. 808, 42
 C. C. A. 637, 4 Am. B. R. 496.

appeal, but the courts are reluctant to exercise this power.<sup>21</sup> The entry of an alias adjudication is not sufficient to extend the time for appeal.<sup>22</sup>

The limit of time is statutory and can not be extended by either a court of bankruptcy or an appellate court.<sup>28</sup> It is not necessary, however, to give the appeal bond, or file the transcript of record in the appellate court, or issue a citation within the time limit. These are necessary to the due prosecution of an appeal, but are not jurisdictional.<sup>24</sup>

## § 833. Cross appeals and cross writs of error.

It is sometimes necessary for a defendant in error or an appellee to prosecute a writ of error or an appeal in order to obtain relief in the appellate court.<sup>1</sup> This is called a cross writ of error or a cross-appeal.

An appellee or a defendant in error is entitled to urge any ground in the appellate court to support the decree below.

<sup>21</sup> In re Wright, 96 Fed. Rep. 820, 3 Am. B. R. 184; In re Girard Glazed Kid Co., 129 Fed. Rep. 841, 12 Am. B. R. 295; In re Hudson Clothing Co., 140 Fed. Rep. 49, 15 Am. B. R. 254.

<sup>22</sup> In re Berkebile (C. C. A. 2d
 Cir.), 144 Fed. Rep. 577, 75 C. C.
 A. 333, 16 Am. B. R. 277.

<sup>28</sup> Credit Co. v. Ark. Cent. R. Co.,
128 U. S. 258, 32 L. Ed. 448; *In re* Alden Electric Co. (C. C. A. 7th Cir.),
123 Fed. Rep. 415, 59 C. C. A. 509,
10 Am. B. R. 370.

24 The Dos Hermanos, 10 Wheat.
306, 6 L. Ed. 328; Peugh v. Davis,
110 U. S. 227, 28 L. Ed. 127; Dodge v. Knowles, 114 U. S. 430, 29 L. Ed. 144; Columbia Iron Works v. Nat. Lead Co. (C. C. A. 6th Cir.),
127 Fed. Rep. 99, 66 C. C. A. 99,
11 Am. B. R. 340.

As to what is necessary to be

done within the ten days, see Secs. post.

<sup>1</sup> McGahan v. Anderson (C. C. A. 4th Cir.), 113 Fed. Rep. 115, 51 C. C. A. 92, 7 Am. B. R. 641; Guarantee Co. v. Phoenix Ins. Co. (C. C. A. 8th Cir.), 124 Fed. Rep. 170, 59 C. C. A. 376.

In Board of Commissioners v. Hurley (C. C. A. 8th Cir.), 169 Fed. Rep. 92, 94, 94 C. C. A. 352, 22 Am. B. R. 209. "But the referee and the district court decided these questions against the trustees, this court has no jurisdiction of them and they are here dismissed because the trustees took no appeal."

<sup>2</sup> In re Naylor & Co. v. Christiansen Harness Mfg. Co. (C. C. A. 6th Cir.), 158 Fed. Rep. 290, 85 C. C. A. 522, 19 Am. B. R. 789, Judge Severens said: "This conclusion makes it unnecessary for

If he feels aggrieved by any portion of the decree or judgment, it is necessary for him to prosecute an independent appeal or writ of error, with assignment of errors, citation and bond, in the same manner and within the time allowed for prosecuting an appeal or writ of error for the purpose of correcting the decree or judgment in this respect.<sup>3</sup>

One record will be sufficient ordinarily for both appeals. A cross-appeal or cross writ of error may be sued out after record lodged in the appellate court on the original appeal.

## § 834. Suing out a writ of error.

An application for a writ of error is regularly made by filing a petition for the writ together with an assignment of errors in the clerk's office. This should be done before it is presented to the judge, who regularly allows the writ, fixes the amount of the bond and signs a citation.

A writ of error may be allowed by the trial judge or a judge of the appellate court. The bond and citation are not jurisdictional, but are essential to perfecting a writ of error. That is to say, the bond may be given and the citation issued after the time within which a writ of error may be sued out.

us to consider the other grounds on which the petitioning creditors sought an adjudication. There was no occasion for the filing of a crossbill. No one can complain of a decree in his favor which grants all he demands. The particular reason which governed the court in making its decree in no wise affected its substance or its value. Besides the appeal of the other party brought the whole matter here. This court would proceed de novo, and if we found that upon any ground established in the case, the decree of the lower court was correct, though a wrong reason was given for it, it would be our duty to affirm the decree."

\* Farrar v. Churchill, 135 U. S. 600-612, 34 L. Ed. 246.

In Board of Commissioners v. Hurley (C. C. A. 8th Cir.), 169 Fed. Rep. 92, 94, 94 C. C. A. 352, 22 Am, B. R. 209, Judge Sanborn said: "An appellee who does not take an appeal, and a defendant in error who does not sue out a writ of error, cannot confer jurisdiction upon an appellate court to consider or review rulings adverse to him upon questions suggested by an assignment or an argument of crosserrors. He cannot be heard upon such questions in the appellate court. He may be heard only in support of the order, decree, or judgment below."

<sup>1</sup> Rule 11 C. C. A., 150 Fed. Rep., xxvii.

A writ of error is sued out within the meaning of the statute when it is filed in the clerk's office.<sup>2</sup> It is not necessary that the judge actually allow the writ provided it is issued and a copy lodged with the clerk of the court to which it is directed.<sup>3</sup> A citation is necessary in a case removed by writ of error.<sup>4</sup>

Writs of error returnable to the Supreme Court or a circuit court of appeals may be issued as well by the clerks of the district courts, under the seal thereof, as by the clerk of the supreme court or of a circuit court of appeals. When so issued they should be as nearly as each case may admit agreeable to the form of a writ of error issued by the clerk of the Supreme Court or the clerk of a circuit court of appeals."

A writ of error propria vigore carries to the appellate court for review only the technical record which consists of the pleadings, the process and the return thereon, the verdict, the judgment and the execution and the return thereon. No bill of exceptions is required to bring questions arising on the technical record into the appellate court. If it is desired to review any rulings occurring during the progress of the trial these are brought into the record by a bill of exceptions, which when properly signed and allowed becomes a part of the record and is taken to the appellate court by the writ of error. A bill of exceptions to be made a part of the record must be seasonably settled and allowed by the trial judge.

<sup>2</sup> Brooks v. Norris, 11 How. 204, 207, 13 L. Ed. 665; Credit Co. v. Arkansas Cent. R. Co., 128 U. S. 260, 32 L. Ed. 448.

<sup>3</sup> Davidson v. Lanier, 4 Wall. 447, 18 L. Ed. 337; Alaska United Gold Min. Co. v. Keating (C. C. A. 9th Cir.), 116 Fed. Rep. 561, 53 C. C. A. 655.

<sup>4</sup> United States v. Phillips, 121 U. S. 254, 30 L. Ed. 914.

<sup>5</sup> R. S. Sec. 1004 authorized the clerk of the circuit court to issue writs of error returnable to the su-

preme court but did not authorize the clerk of the district court to do so. Long v. Farmer's Bank (C. C. A. 8th Cir.), 147 Fed. Rep. 360, 77 C. C. A. 538, 17 Am. B. R. 103. Sec. 1004 was amended January 1912, 37 Stat. at L..., to give the clerk of the district court power to issue writs of error.

<sup>6</sup> Grant Shoe Co. v. Laird, 212 U. S. 445, 53 L. Ed. 591, 21 Am. B. R. 484

Michigan Bank v. Eldred, 143
 U. S. 293, 36 L. Ed. 162; Waldron

## § 835. Taking an appeal.

Whenever a party feels himself aggrieved by a judgment of a court of bankruptcy in one of the cases specified in section 25 or a final decree in equity, he may prosecute an appeal to the circuit court of appeals. Appeals in equity are subject to the same rules, regulations and restrictions as are or may be prescribed in law in cases of writs of error.<sup>1</sup>

An appeal is regularly taken by presenting to the judge of the court of bankruptcy or one of the judges of the circuit court of appeals <sup>2</sup> a petition for appeal, assignments of error, citation and an appeal bond. The assignment of error and the petition should be filed in the clerk's office before the appeal is allowed.<sup>3</sup>

If the papers are regular the judge to whom they are presented allows the appeal and approves the bond. The signing of a citation,<sup>4</sup> or the approving of a bond <sup>5</sup> within time, is a sufficient allowance of an appeal. An appeal will not be allowed unless an assignment of errors is presented with the petition.<sup>6</sup> The giving of a bond is not essential to the taking, although it is to the due prosecution of the appeal.<sup>7</sup> A mandamus will lie to compel a judge to allow

v. Waldron, 156 U. S. 361, 39 L. Ed. 453; Morse v. Anderson, 150 U. S. 156, 37 L. Ed. 1037; United States v. Jones, 149 U. S. 262, 37 L. Ed. 726; Merchants Ins. Co. v. Buckner (C. C. A. 6th Cir.), 93 Fed. Rep. 222, 39 C. C. A. 19.

Gen. Ord. 36; R. S. Sec. 1012. As to procedure on writ of error, see Sec. 314b, ante; R. S. Secs. 997 et seq.; rules of the supreme court; and the rules of the circuit courts of appeals, which are compiled in 90 Fed. Rep. p. li.

<sup>2</sup> Gen. Ord. 36; Norcross v. Mercantile Co. (C. C. A. 8th Cir.), 101 Fed. Rep. 796, 41 C. C. A. 669, 4 Am. B. R. 317.

<sup>8</sup> Rule 11 C. C. A.; *In re* Dunning (C. C. A. 9th Cir.), 94 Fed, Rep.

709; Lloyd v. Chapman (C. C. A. 9th Cir.), 93 Fed. Rep. 599, 35 C. C. A. 474; Lockman v. Lang (C. C. A. 8th Cir.), 128 Fed. Rep. 279, 62 C. C. A. 550, 12 Am. B. R. 497.

<sup>4</sup> Brown v. McConnell, 124 U. S. 489, 31 L. Ed. 495.

<sup>5</sup> Washington, etc. R. R. Co. v. Bradleys, 7 Wall. 575, 19 L. Ed. 274; Brandies v. Cochrane, 105 U. S. 262, 26 L. Ed. 989; Sage v. R. R. Co., 96 U. S. 712, 24 L. Ed. 641.

<sup>6</sup> Rule 11, C. C. A., 90 Fed. Rep. clxvi.

<sup>7</sup> Columbia Iron Works v. National Lead Co. (C. C. A. 6th Cir.), 127 Fed. Rep. 99, 62 C. C. A. 99, 11 Am. B. R. 340. The Dos Hermanos, 10 Wheat. 306, 6 L. Ed. 328; Peugh v. Davis, 110 U. S. 227, 28

an appeal.8 A simpler proceeding, however, is to apply to one of the judges of the appellate court, if the trial judge refuse to allow the appeal.

An appeal may be allowed in open court.<sup>9</sup> In such case no citation is necessary.<sup>10</sup> Such an allowance of an appeal to be regular should be entered upon the minutes.<sup>10</sup>

Whichever mode is adopted, the allowance of the appeal constitutes the taking of an appeal contemplated by the statute.<sup>11</sup> The appeal must, in some way, be presented to the court which made the decree appealed from, thereby putting an end to its jurisdiction over the cause, and making it its duty to send it to the appellate court. This is done by filing the papers within the clerk's office within the time limited by statute.<sup>12</sup> If the petition for an appeal and the assignments of error are filed in due time, although not granted then by the court, the appeal is taken in time because the allowance by the court relates back to the date of filing the papers.<sup>13</sup>

L. Ed. 127; Dodge v. Knowles, 114U. S. 438, 29 L. Ed. 144.

8 United States v. Adams, 6 Wall. 101, 18 L. Ed. 792; United States v. Gomez, 3 Wall. 752, 18 L. Ed. 212; Sage v. R. R. Co., 96 U. S. 712, 24 L. Ed. 641.

Brockett v. Brockett, 2 How.
 238, 11 L. Ed. 251; Reiley v. Lamar, 2 Cranch, 344, 2 L. Ed. 300.

<sup>10</sup> Vansant v. Gas Light Co., 99 U. S. 213, 25 L. Ed. 265.

As to when a citation is necessary see Jacobs v. George 150 U. S. 415, 37 L. Ed. 1127.

<sup>11</sup> Columbia Iron Works v. National Lead Co. (C. C. A. 6th Cir.), 127 Fed. Rep. 99, 62 C. C. A. 99, 11 Am. B. R. 340; The Dos Hermanos, 10 Wheat. 306, 6 L. Ed. 328; Peugh v. Davis, 110 U. S. 227, 28 L. Ed. 127; Dodge v. Knowles, 114 U. S. 438, 29 L. Ed. 144; Noonan v. Chester Park Athletic Co. C. C. A. 6th Cir.), 93

Fed. Rep. 576, 35. C. C. A. 457; Wickelman v. Dick Co., 85 Fed. Rep. 851, 29 C. C. A. 436.

12 Credit Co. v. Ark. Cent. R. Co.,
 128 U. S. 258, 32 L. Ed. 448; Farrar v. Churchill, 135 U. S. 609, 34 L. Ed. 246.

In Ballance v. Forsyth, 21 How. 389, 16 L. Ed. 143, no appeal was taken in court below, and the appellant was permitted to withdraw the transcript for purpose of taking an appeal.

In Credit Co. v. Ark. Cent. R. Co., supra, the appeal was allowed by a justice of the supreme court in Washington, D. C., on the last day within which an appeal could be taken, but was not presented to the circuit court until five days thereafter. The appeal was not taken in time.

Latham v. United States, 131U. S. Appx. xcvii, 19 L. Ed. 452;

Whether a court of bankruptcy has power to set aside the allowance of an appeal and grant a second appeal depends upon whether the general power of the court over the order is at an end by reason of the appeal being perfected and the cause transferred to the appellate court, or because it was not done within the term in which the first order was made.<sup>14</sup>

A judge of a court of bankruptcy is not required to make findings of fact for the purpose of an appeal from his decision.<sup>15</sup>

## § 836. Parties to an appeal or writ of error.

An appeal can only be prosecuted by a party to the proceedings upon which the judgment was entered, and who has been aggrieved thereby.

The right of appeal depends upon whether the appellant is, in a legal sense, aggrieved; and that must be determined by considering not upon what grounds the judge has proceeded, but what effect his action has upon the claims of the appellant. The party appealing must have an interest in the proceedings. Where he has parted with all his interest in the subject of litigation *pendente lite* he can not appeal from a judgment which injuriously affects such interest.<sup>2</sup>

Where a claim is disallowed the creditor may prosecute an appeal. Where a claim is allowed the trustee, representing all of the creditors, is the proper person to prosecute the appeal.<sup>3</sup> It has been held that a creditor may appeal from

United States v. Vigil, 10 Wall. 423, 19 L. Ed. 954; United States v. Adams, 6 Wall. 101, 18 L. Ed. 792.

<sup>14</sup> Aspen Min. & Smelt. Co. v. Billings, 150 U. S. 31, 37 L. Ed.
986; First Nat. Bank v. State Nat. Bank (C. C. A. 9th Cir.), 131 Fed.
Rep. 430, 65 C. C. A. 414, 12 Am.
B. R. 440.

<sup>15</sup> In re Meyers, 105 Fed. Rep. 353, 5 Am. B. R. 4.

See Farmers' Loan & Trust Co.
 Waterman, 106 U. S. 265, 27
 Ed. 115.

<sup>2</sup> See Meyer v. Pritchard, 23 Law. Coop., S. C. R. 961; Lord v. Veazie, 8 How. 251, 12 L. Ed. 1067; Chamberlain v. Cleveland, 1 Black, 419, 17 L. Ed. 93.

<sup>8</sup> Foreman v. Burleigh (C. C. A. 1st Cir.), 109 Fed. Rep. 313, 48 C. C. A. 376, 6 Am. B. R. 230; Living-

the allowance of a claim of another creditor in case the trustee refuses to appeal.<sup>4</sup> A better practice is for the dissatisfied creditor to procure an order of the court of bankruptcy to either direct an appeal by the trustee or permit the creditor to appeal in the name of the trustee.<sup>5</sup>

On an appeal by a creditor from an order approving a composition all the assenting creditors who have received money due them under the composition must be made parties to the appeal.<sup>6</sup>

A creditor or the bankrupt are the proper parties to take an appeal from a judgment granting or refusing a discharge. A trustee will not ordinarily be permitted to prosecute an appeal from such judgments, for the reason that the contest is between creditors and the bankrupt and does not affect the administration of the bankrupt's estate in any respect.

Where an appeal is prosecuted from a judgment adjudging or refusing to adjudge the defendant a bankrupt it should be prosecuted by the bankrupt or by the petitioning creditors or a creditor intervening for the purpose of contesting

stone v. Heineman (C. C. A. 6th Cir.), 120 Fed. Rep. 786, 57 C. C. A. 154, 10 Am. B. R. 39; Chatfield v. O'Dwyer (C. C. A. 8th Cir.), 101 Fed. Rep. 797, 42 C. C. A. 30, 4 Am. B. R. 313; Gray v. Grand Forks Mercantile Co. (C. C. A. 8th Cir.), 138 Fed. Rep. 344, 70 C. C. A. 634, 14 Am. B. R. 780.

<sup>4</sup> In re Roche (C. C. A. 5th Cir.), 101 Fed. Rep. 956, 42 C. C. A. 115, 4 Am. B. R. 396; McDaniel v. Stroud (C. C. A. 4th Cir.), 106 Fed. Rep. 486, 45 C. C. A. 446, 5 Am. B. R. 685; Ohio Valley Bank Co. v. Mack (C. C. A. 6th Cir.), 163 Fed. Rep. 155, 89 C. C. A. 605, 20 Am. B. R. 919.

In Orcutt & Co. v. Green, 204 U. S. 96, 98, 51 L. Ed. 390, 17 Am. B. R. 72, in view of the position of the trustee and his refusal him-

self to act in the matter, Green asked that he might be permitted to prosecute the appeal for himself and the other creditors to review the judgment of the district court in the circuit court of appeals, and did so. That court reversed the decision of the lower court.

<sup>5</sup> Chatfield v. O'Dwyer (C. C. A. 8th Cir.), 101 Fed. Rep. 797, 42 C. C. A. 30, 4 Am, B. R. 313. See also McDaniel v. Stroud (C. C. A. 4th Cir.), 106 Fed. Rep. 486, 45 C. C. A. 446, 5 Am. B. R. 685; Ohio Valley Bank Co. v. Mack (C. C. A. 6th Cir.), 163 Fed. Rep. 155, 89 C. C. A. 605, 20 Am. B. R. 919.

Marshall, Field & Co. v. Wolf
Bro. Dry Goods Co. (C. C. A.
8th Cir.), 120 Fed. Rep. 815, 57
C. C. A. 326, 9 Am. B. R. 693

the adjudication, but not by one who intervenes after the judgment for the purpose of rehearing the order of adjudication.

It is well settled that all the parties against whom a joint judgment is rendered must, except where they have distinct and separate interests and the decree is several and does not jointly affect them all, unite in the appeal. Thus it would seem that where an appeal is taken from a judgment adjudging a partnership bankrupts, that all the partners should unite in the appeal. Where an appeal is taken from a judgment rejecting a joint debt or claim, the owners of such claim should unite in the appeal. Where an appeal is taken from a judgment refusing to adjudge a defendant a bankrupt, that all the petitioning creditors at least, and probably also such creditors as may have appeared to join in the petition under section 59f, should unite in the appeal.

Where one of several persons having a joint interest desires to appeal and the others interested with him do not, he may appeal alone without joining the others as appellants by showing a valid excuse for not joining them. This can be done only by a summons and severance or some equivalent proceedings, such as a request to the others and their refusal to join in the appeal, or at least a notice to them to appear and their failure to do so. This must be evi-

<sup>7</sup> In re Meyer (C. C. A. 2d Cir.), 98 Fed. Rep. 976, 39 C. C. A. 368, 3 Am. B. R. 559.

<sup>8</sup> In re Columbia Real Estate Co. (C. C. A. 7th Cir.), 112 Fed. Rep. 643, 50 C. C. A. 406, 7 Am. B. R. 441.

Hardee v. Wilson, 146 U. S.
 179, 36 L. Ed. 933.

Crim v. Woodford (C. C. A. 4th Cir.), 136 Fed. Rep. 34, 68 C. C. A. 584, 14 Am. B. R. 302.

<sup>10</sup> O'Dowd v. Russell, 14 Wall. 404, 20 L. Ed. 857; Inglehart v. Stansbury, 151 U. S. 68, 38 L. Ed. 76; Masterson v. Herndon, 10 Wall. 416, 19 L. Ed. 953.

In Masterson v. Herndon, supra, the supreme court said: "We do not attach importance to the technical mode of proceeding called summons and severance. We should have held this appeal good if it had appeared in any way by the record that Maverick had been notified in writing to appear, or, if appearing, had refused to join. But the mere allegation of his refusal, in the petition of the appellant, does not prove this. We think there should

dent upon the record of the court appealed from in order to enable the party prevailing in that court to enforce his decree against those who do not wish to have it reviewed, and to prevent him and the appellate court from being vexed by successive appeals in the same matter.<sup>11</sup> Where an appellant obtains an order of severance in the court below, and does not make parties to his appeal some of the parties below who are interested in maintaining the decree, he can not ask its reversal on any matter which will injuriously affect their interests.<sup>12</sup>

It is equally well settled that where the judgment is severable in fact and in law one party thereto may be allowed to prosecute an appeal therefrom without joining a codefendant who does not desire to appeal.<sup>13</sup> Thus it would seem that an appeal from a judgment rejecting several distinct debts or claims that any one debtor or claimant would be entitled to prosecute an appeal without joining the others.<sup>14</sup>

be a written notice and due service, or the record should show his appearance and refusal, and that the court on that ground granted an appeal to the party who prayed for it, as to his own interest. Such a proceeding would remove the objections made to permitting one to appeal without joining the other; that is, it would enable the court below to execute its decree so far as it could be executed on the party who refused to join, and to stop that party from bringing an appeal for the same matter. The latter point is one to which the court has always attached much importance, and it has strictly adhered to the rule under which this case must be dismissed, and also to the general proposition that no decree can be appealed from which is not final in the sense of disposing of the whole matter in controversy so far as it has been possible to adhere to it without hazarding the substantial rights of parties interested. We dismiss this appeal with less regret, as there is still time to obtain another on proceedings not liable to the objection taken to this."

<sup>11</sup> Inglehart v. Stansbury, 151 U. S. 68, 38 L. Ed. 76, and cases collated in the opinion.

<sup>12</sup> Terry v. Abraham, 93 U. S.38, 23 L. Ed. 794.

18 Forgay v. Conrad, 6 How. 201,
12 L. Ed. 404; City National Bank
v. Hunter, 129 U. S. 557, 578, 32 L.
Ed. 752; Brewster v. Wakefield, 22
How. 118, 128, 16 L. Ed. 301.

14 In Crim v. Woodford (C. C. A. 4th Cir.), 136 Fed. Rep. 34, 68 C. C. A. 584, 14 Am. B. R. 302, the court said: "There is a motion to dismiss the appeal because the interest of the petitioners Crim, Moore, and Manown are not joint,

Where such an appeal is taken it carries with it so much of the case and such of the parties as are necessary for the determination of his rights.<sup>15</sup>

All the parties whose rights would be affected should be made appellees. Thus, in an appeal by a bankrupt from anadjudication in bankruptcy upon an involuntary petition, he should make appellees the petitioning creditors and probably such other creditors as have entered their appearance to join in the petition under section 59f. In an appeal from a judgment denying a discharge the bankrupt should make the creditors opposing the discharge appellees. In an appeal by creditors from a judgment rejecting a debt or claim the trustee should be made appellee. He represents all the creditors and therefore the creditors are not necessary parties. In an appeal from a judgment refusing to adjudicate the defendant a bankrupt, or granting a discharge, the bankrupt only should be made appellee. In an appeal from a judgment allowing a debt or claim of five hundred dollars or over the creditor or creditors only, owning such claims, need be made appellees.

On an appeal by a bankrupt from an order refusing to confirm a composition the creditors must be made appellees and the trustee does not represent them for this purpose. <sup>16</sup> When an appeal is taken by a creditor from an order approving a composition all the creditors assenting to such

but are several and distinct, and therefore it is claimed they can not collectively join in the appeal. It is true that each of the appellants named has a separate interest, but, as the court below entered but one judgment and allowed the joint appeal, there appears to be no good reason why they should not all be heard together, as the main question determined by the court below and for consideration here is com-

mon to all the appellants, and separate appeals would have served no good purpose, and involved additional and unnecessary expense. The motion to dismiss the appeal on that ground therefore is refused."

<sup>15</sup> Milner v. Meek, 95 U. S. 252,24 L. Ed. 444.

16 Ross v. Saunders (C. C. A. 1st
 Cir.), 105 Fed. Rep. 915, 45 C. C.
 A. 123, 5 Am. B. R. 350.

composition and having received money due them under the composition must be made parties to the appeal.<sup>17</sup>

In a controversy between a trustee and certain lien creditors the stake holders of the fund in controversy are not necessary parties to the appeal.<sup>18</sup>

## § 837. Petition for appeal.

The petition for appeal is regularly entitled in the court of bankruptcy, together with the style of the case. It may be substantially in the following words: "The above-named A. B., conceiving himself aggrieved by the judgment made and entered on the —— day of ——, in the above-entitled cause, does hereby appeal from such judgment to the United States circuit court of appeals for the —— circuit, for the reasons specified in the assignment of errors, which is filed herewith, and he prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which such judgment was made, duly authenticated, may be sent to the United States circuit court of appeals for the circuit." 1 This petition should be signed by the petitioner or his counsel and dated. The judge ordinarily endorses upon the petition that the foregoing claim of appeal is allowed and signs it, together with the date of the allowance. The approving of an appeal bond or signing a citation is a sufficient allowance.2

## § 838. Assignments of error.

The appellant must file with the clerk of the court below, with his petition for the appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged.<sup>1</sup>

<sup>17</sup> Marshall, Field & Co. v. Wolf
& Bro. Dry Goods Co. (C. C. A.
8th Cir.), 120 Fed. Rep. 815, 57 C.
C. A. 326, 9 Am. B. R. 693.

Love, Trustee, v. Export Storage Co. (C. C. A. 6th Cir.), 143
 Fed. Rep. 1, 74 C. C. A. 155, 16
 Am. B. R. 171.

<sup>1</sup> See Form No. 166, post.

<sup>2</sup> R. R. Co. v. Bradleys, 7 Wall. 577, 19 L. Ed. 274; Sage v. R. R. Co., 96 U. S. 712, 24 L. Ed. 641; Brown v. McConnell, 124 U. S. 489, 31 L. Ed. 495.

<sup>1</sup> Rule 11, C. C. A., and cases collated in 90 Fed. Rep., p. cxlvi, et

No appeal or writ of error will be allowed until such assignment of errors has been filed. Such assignment of errors forms part of the transcript of the record and must be printed with it. When this is not done, counsel will not be heard, except at the request of the court, and errors not assigned according to this rule will be disregarded, but the court at its option, may notice a plain error not assigned.<sup>2</sup> A general assignment of error may be amended by filing a more specific assignment.<sup>3</sup> It has been held that where the assignment of errors is included in the petition it is sufficient.<sup>4</sup>

## § 839. Bond on appeal or writ of error.

An appeal bond is ordinarily essential to the prosecution of an appeal, although it is not to the taking of an appeal. It has been permitted to be given by the appellant in the appellate court.<sup>2</sup> Trustees are not required to give such bonds.<sup>3</sup>

seq.; In re Dunning (C. C. A. 9th Cir.), 94 Fed. Rep. 709, 36 C. C. A. 437; Lloyd v. Chapman (C. C. A. 9th Cir.), 93 Fed. Rep. 599, 35 C. C. A. 474; Lockman v. Lang (C. C. A. 8th Cir.), 128 Fed. Rep. 279, 62 C. C. A. 550, 12 Am. B. R. 497; Flickinger v. First Nat. Bank (C. C. A. 6th Cir.), 145 Fed. Rep. 162, 76 C. C. A. 132, 16 Am. B. R. 678; Acme Food Co. v. Meier (C. C. A. 6th Cir.), 153 Fed. Rep. 74, 82 C. C. A. 208, 18 Am. B. R. 550.

For forms of assignment of errors, see Loveland's Forms of Fed. Prac., Nos. 1403 to 1407.

<sup>2</sup> Dufour v. Lang, 54 Fed. Rep. 913, 917, 4 C. C. A. 663; Mitchell v. Marker, 62 Fed. Rep. 139, 10 C. C. A. 306; McClellan v. Pyeatt, 50 Fed. Rep. 686, 1 C. C. A. 613; Haldane v. United States, 69 Fed. Rep. 819, 16 C. C. A. 447; Prichard v. Budd, 76 Fed. Rep. 710, 22 C. C.

A. 504. Rule 2, C. C. A., and cases collated in 90 Fed. Rep., p. cxlvi, et seq.

<sup>3</sup> Flickinger v. First Nat. Bank (C. C. A. 6th Cir.), 145 Fed. Rep. 162, 76 C. C. A. 132, 16 Am. B. R. 678.

<sup>4</sup> Central Trust Co. v. Continental Trust Co., 86 Fed. Rep. 517, 30 C. C. A. 235.

<sup>1</sup>R. S. Secs. 1000 and 1012; Dodge v. Knowles, 114 U. S. 430, 29 L. Ed. 144; Peugh v. Davis, 110 U. S. 227, 28 L. Ed. 127; The Dos Hermanos, 10 Wheat. 306, 311, 6 L. Ed. 328.

<sup>2</sup> Anson, Bangs & Co. v. Blue Ridge R. R. Co., 23 How. 1, 16 L. Ed. 517; Brobst v. Brobst, 2 Wall. 96, 17 L. Ed. 905; Seymour v. Freer, 5 Wall. 822, 18 L. Ed. 564. See also Peugh v. Davis, 110 U. S. 227, 28 L. Ed. 127!

<sup>3</sup> B. A. 1898, Sec. 25c.

The bond on appeal or writ of error is regularly conditioned that the plaintiff shall prosecute his appeal or writ of error to effect and answer all damages and costs if he fail to make such plea good.<sup>4</sup> All the appellants or plaintiffs in error need not join in the bond.<sup>5</sup> The bond is made payable to the plaintiff in error or the appellee.<sup>6</sup> It is not essential to the validity of an appeal bond that all of the appellees be named in it.<sup>7</sup> It should not be made payable to any other person.<sup>8</sup>

The amount of the bond is fixed by the judge allowing the appeal or writ of error. He is the sole and exclusive judge of what it should be and his decision is final, unless he violates a statute or rule of practice. The judge can not delegate the approval of the bond to the clerk or to a commissioner. It is not necessary that the judge approve the bond in court.

The appellate court, however, may change the amount of the bond, in a proper case, where the circumstances have changed so that the security which was good and sufficient at the time it was taken does not continue to be so.<sup>13</sup> Where an appeal bond is defective the appellate court will not, for

<sup>4</sup> For form of bond, see Form No. 169, post. See also Gay v. Parpart, 101 U. S. 391, 25 L. Ed. 841; Chateaugay Ore and Iron Co. v. Blake, 35 Fed. Rep. 804; Peace River Phosphate Co. v. Edwards, 70 Fed. Rep. 728, 17 C. C. A. 358.

<sup>5</sup> Brockett v. Brockett, 2 How. 238, 11 L. Ed. 251.

<sup>6</sup> Bigler v. Waller, 12 Wall. 142,
 20 L. Ed. 260.

<sup>7</sup> Flickinger v. First Nat. Bank (C. C. A. 6th Cir.), 145 Fed. Rep. 162, 76 C. C. A. 132, 16 Am. B. R. 678

8 Davenport v.\Fletcher, 16 How.142, 14 L. Ed. 879.

<sup>9</sup> Jerome v. McCarter, 21 Wall. 17, 22 L. Ed. 515.

O'Reilly v. Edrington, 96 U. S.
 724, 24 L. Ed. 659; First Nat'l Bank
 v. Omaha, 96 U. S. 737, 24 L. Ed.
 881; Freeman v. Clay, 48 Fed. Rep.
 849, 1 C. C. A. 115.

<sup>11</sup> Haskins v. R. R. Co., 109 U.S. 106, 27 L. Ed. 873.

<sup>12</sup> Hudgins v. Kemp, 18 How. 530, 15 L. Ed. 511, 514.

18 Jerome v. McCarter, 21 Wall.
17, 22 L. Ed. 515; Williams v. Claffin, 103 U. S. 753, 26 L. Ed. 606; Harwood v. Dickerhoff, 117 U. S. 200, 29 L. Ed. 887; Johnson v. Waters, 108 U. S. 4, 27 L. Ed. 630.

that reason, dismiss the appeal, but will give the appellant an opportunity to furnish new security.<sup>14</sup>

#### § 840. Supersedeas.

An appeal does not operate as a supersedeas to stay proceedings in a court of bankruptcy. \*\* A supersedeas is a statutory right. It follows as a matter of law from a compliance by the appellant or plaintiff in error with the provisions of the act of congress in that behalf. \*\* Without such compliance no court can confer it. \*\*

The statute which regulates the matter of supersedeas is as follows: "In any case where a writ of error may be a supersedeas the defendant may obtain such supersedeas by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office where the record remains, within sixty days, Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law on the issuing of the citation. But if he desires to stay process on the judgment, he may, having served his writ of error as aforesaid, give the security required by law within sixty days after the rendition of such judgment, or afterward with the permission of a justice or judge of the appellate

14 Davis v. Wakelee, 156 U. S. 684-5, 39 L. Ed. 578; New Orleans Ins. Co. v. Albro Co., 112 U. S. 505, 28 L. Ed. 809; Union Pacific Co. v. Callaghan, 161 U. S. 95, 40 L. Ed. 628.

<sup>1\*</sup> In re Brady, 169 Fed. Rep. 152, 21 Am. B. R. 364.

In Keck Mfg. Co. v. Lorsch (C. C. A. 6th Cir.), 179 Fed. Rep. 485, 103 C. C. A. 65, 24 Am. B. R. 705, prior to this decision an application was made to the circuit court of appeals for supersedeas to stay "a sale and all further proceedings in the district court" pending the appeal from the order of adjudica-

tion. The application was granted June 10, 1910, upon the appellant giving bond in the sum of \$30,000. The court held upon this application that the appeal did not suspend proceedings to administer the estate unless the bond be given (opinion not reported).

<sup>1</sup> R. S. Sec. 1007; Goddard v. Ordway, 94 U. S. 672, 24 L. Ed. 237; Gay v. Parpart, 101 U. S. 391, 25 L. Ed. 841.

<sup>2</sup> French v. Shoemaker, 12 Wall. 100, 20 L. Ed. 270; Kitchen v. Randolph, 93 U. S. 86, 23 L. Ed. 810; Sage v. R. R. Co., 93 U. S. 416, 23 L. Ed. 933.

court. And in such cases where a writ of error may be a supersedeas, executions shall not issue until the expiration of (the said term of sixty) (ten) days." 3

The allowance of an appeal with reference to superseding a judgment is considered the equivalent of a writ of error. It has accordingly been held that an appeal, to operate as a supersedeas, must be perfected and the security given in accordance with the provisions quoted above. Where a petition for rehearing, or a motion to set aside the judgment, is filed, the time does not begin to run until such petition or motion has been denied. Where the appeal is taken within sixty days a judge of the appellate court may allow a supersedeas after that time. But if no appeal is taken within the sixty days' period no judge of the appellate court or the court itself has power to grant a supersedeas.

The application for a supersedeas is regularly made to the court of bankruptcy and not to the appellate court.<sup>7</sup>. The amount of the bond is fixed by the judge allowing it. He is the sole and exclusive judge of what it should be, and his decision is final, unless he violates a statute or rule of practice.<sup>8</sup> The appellate court may, however, in a proper case and under proper circumstances, change the amount of the

<sup>&</sup>lt;sup>3</sup> R. S. Sec. 1007.

<sup>&</sup>lt;sup>4</sup> Adams v. Law, 16 How. 148, 14 L. Ed. 880; Hudgins v. Kemp, 18 How. 535, 15 L. Ed. 511, 514; French v. Shoemaker, 112 Wall. 100, 20 L. Ed. 270; Bigler v. Waller, 12 Wall. 149, 20 L. Ed. 260; Kitchen v. Randolph, 93 U. S. 86, 23 L. Ed. 810.

<sup>&</sup>lt;sup>5</sup> Texas & P. Ry. Co. v. Murphy, 111 U. S. 488, 28 L. Ed. 492; Brockett v. Brockett, 2 How. 238, 11 L. Ed. 251; Memphis v. Brown, 94 U. S. 715, 24 L. Ed. 244. In computing this time, Sundays are excluded. See Danville v. Brown, 128 U. S. 503, 32 L. Ed. 507.

<sup>&</sup>lt;sup>6</sup> Peugh v. Davis, 110 U. S. 227, 28 L. Ed 127.

<sup>&</sup>lt;sup>7</sup> Kitchen v. Randolph, 93 U. S. 86, 23 L. Ed. 810; New England R. R. Co. v. Hyde (C. C. A. 1st Cir.), 101 Fed. Rep. 397, 41 C. C. A. 404; Logan v. Goodwin (C. C. A. 8th Cir.), 101 Fed. Rep. 654, 41 C. C. A. 537; Covington Stock Yards v. Keith. 121 U. S. 248, 30 L. Ed. 914.

As to when the appellate court will grant a supersedeas, see Hunt v. Oliver, 109 U. S. 177, 27 L. Ed. 897; Railroad v. Bradleys, 7 Wall. 575, 19 L. Ed. 274.

<sup>&</sup>lt;sup>8</sup> Jerome v. McCarter, 21 Wall.17, 22 L. Ed. 515.

bond, or vacate a supersedeas when the approval of the bond was obtained by fraud or perjury; and in such cases may refuse to accept a new bond. 10

The approval of the bond need not be in writing.<sup>11</sup> The signing of a citation and taking the oath of the sureties as to their sufficiency is a sufficient approval of the bond.<sup>12</sup> The bond when approved is a matter of record in the bankruptcy court, and a copy thereof should be included in the transcript of the record.

#### § 841. Citation.

The object of a citation on an appeal is to give notice of the removal of the case into the appellate court. The citation is usually presented to and signed by the judge <sup>1</sup> at the time the appeal is allowed. It may, however, be signed by the judge subsequently or issued by the appellate court at any time before the appeal becomes inoperative.<sup>2</sup>

The issuing of the citation is not jurisdictional, but the court will not hear a case until the parties are brought into court by citation.<sup>3</sup> The order in cases, where all of the

Jerome v. McCarter, 21 Wall.
17, 22 L. Ed. 515; Williams v. Claffin, 103 U. S. 753, 26 L. Ed. 606; Harwood v. Dickerhoff, 117 U. S. 200, 29 L. Ed. 887; Johnson v. Waters, 108 U. S. 4, 27 L. Ed. 630.

Florida Cent. R. R. Co. v.
 Schutte, 100 U. S. 644, 25 L. Ed. 605.
 Davidson v. Lanier, 4 Wall.
 447, 18 L. Ed. 377.

<sup>12</sup> Silver v. Ladd, 6 Wall. 440, 18 L. Ed. 828.

<sup>1</sup>R. S. Secs. 998 and 999. For Form of Citation, see Form No. 170, post.

<sup>2</sup> Sutherland v. Pearce (C. C. A. 9th Cir.), 186 Fed. Rep. 787, 108 C. C. A. 657; Lockman v. Lang (C. C. A. 8th Cir.), 132 Fed. Rep.

1, 65 C. C. A. 621, 12 Am. B. R. 497; Gray v. Grand Fork Mercantile Co., 138 U. S. 344, 14 Am. B. R. 780; Columbia Iron Works v. National Lead Co. (C. C. A. 6th Cir.), 127 Fed. Rep. 99, 62 C. C. A. 99, 11 Am. B. R. 340; Altenberg v. Grant, 54 U. S. App. 312, 83 Fed. Rep. 980, 28 C. C. A. 244; R. R. Equipment Co. v. Southern Ry. Co. (C. C. A. 6th Cir.), 92 Fed. Rep. 541, 34 C. C. A. 519.

Sutherland v. Pearce (C. C. A.
9th Cir.), 186 Fed. Rep. 787, 108
C. C. A. 657; Mendenhall v. Hall,
134 U. S. 559, 33 L. Ed. 1012; Chicago & P. R. Co. v. Blair, 100 U.
S. 661, 25 L. Ed. 587; R. R. Equipment Co. v. Southern Ry. Co. (C.
C. A. 6th Cir.), 92 Fed. Rep. 541,

necessary parties have not been served, is that the case stand over for the purpose of giving the appellant an opportunity to apply for a citation.

Ordinarily no citation is necessary on an appeal allowed in open court and perfected during the term at which the decree appealed from was rendered.<sup>4</sup> As there are no terms in bankruptcy a citation is regularly issued in each case because the appeal can not be said to be perfected at the term at which the judgment below is rendered.<sup>5</sup>

A citation is essential to a writ of error.<sup>5\*</sup> Notice of a writ of error given in open court at the same term the judgment is rendered is not equivalent of the citation. In this respect writs of error differ from appeals taken in open court.<sup>5\*\*</sup>

The citation must be served upon the appellee or his attorney of record in the court below.<sup>6</sup> It may be served by the marshal. The usual practice, however, is for counsel for the appellee to accept service in writing upon the citation without formal service to the marshal.<sup>7</sup> Where the citation is actually issued upon the allowance of an appeal the omission to serve it before the first day of the term does not avoid the appeal. A new citation may be ordered to be issued and served.<sup>8</sup> It is not sufficient proof of service of a citation to file an affidavit that notice of citation was given to defend-

34 C. C. A. 519; Evans v. State Bank, 134 U. S. 330, 33 L. Ed. 917; Richardson v. Green, 130 U. S. 104, 32 L. Ed. 872.

<sup>4</sup> Jacobs v. George, 150 U. S. 415, 37 L. Ed. 1127.

<sup>5</sup> Lockman v. Lang (C. C. A. 8th Cir.), 132 Fed. Rep. 1, 65 C. C. A. 621, 12 Am. B. R. 497.

5\* United States v. Phillips, 121 U. S. 254, 30 L. Ed. 914; Kerrch v. United States (C. C. A. 1st Cir.), 171 Fed. Rep. 366, 96 C. C. A. 258, 22 Am. B R. 544. 5\*\* United States v. Phillips, 121 U. S. 254, 30 L. Ed. 914.

<sup>6</sup> Bacon v. Hart, 1 Black, 39, 17
L. Ed. 52; Chicago & P. R. Co. v. Blair, 100 U. S. 661, 25 L. Ed. 587; Nations v. Johnson, 24 How. 195, 16 L. Ed. 628.

Bigler v. Waller, 12 Wall, 142,
 L. Ed. 260.

8 Sutherland v. Pearce (C. C. A.
9th Cir.), 186 Fed. Rep. 787, 108
C. C. A. 657; Dayton v. Lash, 94
U. S. 112, 24 L. Ed. 33; Altenberg
v. Grant, 83 Fed. Rep. 980, 28 C.
C. A. 244.

ant's attorney by depositing in the postoffice a copy of said citation, postpaid, addressed to them at their respective places of abode and giving the names and places.<sup>9</sup>

Where a party dies before an appeal is allowed and prosecuted, the suit should be revived in the court of bankruptcy and the citation should be addressed to the proper party in the record at that time.<sup>10</sup>

All appeals and citations must be made returnable not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day.<sup>11</sup>

A general appearance by the appellee, at the term the record is filed, is a waiver of the issuing and serving of a citation. <sup>12</sup> The appearance of counsel at a subsequent term and making a motion to dismiss does not waive a citation. <sup>13</sup> A general appearance can not be withdrawn or changed to a special appearance without leave of court. <sup>14</sup>

A writ of mandamus is not ordinarily granted to compel a judge to sign a citation. <sup>15</sup> If the judge refuses to sign a citation, resort should be had to a judge of the appellate court.

## § 842. The record on appeal or writ of error.

When an appeal has been allowed or a writ of error sued out, a transcript of the record of the proceedings in the court of bankruptcy must be prepared and filed in the appel-

<sup>o</sup> Tripp v. Santa Rosa Street R. Co., 144 U. S. 126, 36 L. Ed. 371.

<sup>10</sup> Bigler v. Waller, 12 Wall. 142,
 20 L. Ed. 260.

<sup>11</sup> Rule 14, C. C. A., 90 Fed. Rep. clviii; Peace River Phosphate Co. v. Edwards, 70 Fed. Rep. 728, 17 C. C. A. 358; Altenberg v. Grant, 83 Fed. Rep. 980, 28 C. C. A. 244; Central Trust Co. v. Continental Trust Co., 86 Fed. Rep. 517, 30 C. C. A. 235; Freeman v. Clay, 48 Fed. Rep. 849, 1 C. C. A. 115.

<sup>12</sup> Richardson v. Green, 130 U. S. 104, 32 L. Ed. 872; Buckingham v. McLean, Assignee in bankruptcy. 13 How. 150, 14 L. Ed. 90; United States v. Armejo, 131 U. S. Appendix, Ixxxii.

18 Radford v. Folsom, 123 U. S.725, 31 L. Ed. 292.

<sup>14</sup> United States v. Armejo, 131 U. S. Appendix, Ixxxii; United States v. Curry, 6 How. 106, 12 L. Ed. 363.

<sup>15</sup> Ex parte Virginia Commissioners, 112 U. S. 177, 28 L. Ed. 691.

late court. The record required to be certified is the record of the case in the court of bankruptcy.<sup>1</sup>

The referee has no power to certify a record of proceedings before him to a circuit court of appeals.<sup>2</sup> It is the duty of the clerk to make the transcript after and not before he is directed by counsel to do so. His fees are prescribed by statute <sup>3</sup> and should be paid before the transcript is delivered for filing. If a clerk refuses to produce the transcript he may be compelled to do so by mandamus or order of court.<sup>4</sup>

No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions and other proceedings, which are necessary to the hearing in the appellate court, shall be filed.<sup>5</sup> The appeal makes the entire record available to counsel for the appellant and imposes upon him and the clerk of the lower court the duty of inserting in the transcript of the record sent to the appellate court everything material to the question to be presented there.<sup>6</sup> Such orders and proceedings as are had before the referee in any case, after the same is concluded by him and the proceedings certified, become a part of the record of the case and as such belong in the office of the clerk of the court

<sup>1</sup> Cook Inlet Coal Fields Co. v. Caldwell (C. C. A. 4th Cir.), 147 Fed. Rep. 475, 78 C. C. A. 17, 17 Am. B. R. 135.

<sup>2</sup> Cook Inlet Coal Fields Co. v. Caldwell (C. C. A. 4th Cir.), 147 Fed. Rep. 475, 78 C. C. A. 17, 17 Am. B. R. 135.

<sup>8</sup> R. S. Sec. 828. See Thornton v. Ins. Co. 125 Fed. Rep. 250.

<sup>4</sup> United States v. Gomez, 3 Wall. 766, 18 L. Ed. 212; United States v. Booth, 18 How. 477, 15 L. Ed. 464.

<sup>5</sup> Rule 14, C. C. A., 90 Fed. Rep. clvii; Williams Bros. v. Savage (C. C. A. 4th Cir.), 120 Fed. Rep. 497, 9 Am. B. R. 720; Cunningham v. German Ins. Bank (C. C. A. 6th Cir.), 103 Fed. Rep. 932, 43 C. C.

A. 377, 4 Am. B. R. 192; Devries
v. Shanahan (C. C. A. 4th Cir.),
122 Fed. Rep. 629, 58 C. C. A. 482,
10 Am. B. R. 518.

In re Friedman (C. C. A. 2d Cir.), 161 Fed. Rep. 260, 88 C. C. A. 306, 20 Am. B. R. 37, a record was held defective when it failed to give filing date the papers contained in it.

<sup>6</sup> Dodge v. Norlin (C. C. A. 8th Cir.), 133 Fed. Rep. 363, 66 C. C. A. 425, 13 Am. B. R. 176; First Nat. Bank v. Abbott (C. C. A. 8th Cir.), 165 Fed. Rep. 852, 91 C. C. A. 538, 21 Am. B. R. 436.

See also Teller v. United States (C. C. A. 8th Cir.), 111 Fed. Rep. 119, 49 C. C. A. 263.

and may be included by him as a part of the record. Where a case has been before an appellate court on a former appeal the record on the second appeal should be complete in itself, for the reason that an appellate court is not bound to take judicial notice of its own records.<sup>7</sup>

The record should contain only such matter as is necessary to the hearing, and not irrelevant matter or useless repetitions.<sup>8</sup> It is the duty of the parties or their counsel to attend to this.<sup>8</sup> In taking appeals in bankruptcy it will frequently occur that many papers and proceedings ought not to be included in the record. That the clerk may not be left in doubt, he may require of the attorney for the appellant a præcipe stating specifically what the record shall contain, and attach a copy of the præcipe to the transcript.<sup>9</sup> The

7 In re Osborne (C. C. A. 1st Cir.), 115 Fed. Rep. 1, 52 C. C. A. 595, 8 Am. B. R. 165, the court said: "While it is well settled that we can take judicial knowledge of our own records, it is not at all clear that we are always required to do so. Cushman Paper Box Machine Co. v. Goddard, 95 Fed. Rep. 664, 666, 37 C. C. A. 221. The proper and safe way of proceeding even with reference to the tribunal in which the prior record remains, is by plea and proof. Nevertheless, as the practice with reference to a petition of the character now before us is not yet fully understood, even if it may be said to be thoroughly settled, we will avail ourselves of the right which we have to take judicial knowledge of our own proceedings."

See observation of the supreme court in Union Pac. Railway Co. v. Stewart, 95 U. S. 279, 284, 24 L. Ed. 431; Burnham v. Street Ry. Co., 87 Fed. Rep. 168, 30 C. C. A. 594; Nashua & Lowell R. Corp. v. Bos-

ton & Lowell R. Corp., 61 Fed. Rep. 237, 9 C. C. A. 468; Union Pac. R. Co. v. United States, 116 U. S. 402, 29 L. Ed. 677.

If the record contains such parts as is called for by either party it is sufficient; Blanks v. Klein, 49 Fed. Rep. 1, 1 C. C. A. 254; Lamb Knit Goods Co. v. Lamb Glove & Mitten Co. (C. C. A. 6th Cir.), 120 Fed. Rep. 267, 273, 56 C. C. A. 547; Shaffer v. Koblegard Co. (C. C. A. 4th Cir.), 183 Fed. Rep. 71, 105 C. C. A. 363, 24 Am. B. R. 898.

O Cunningham v. German Ins.
Bank (C. C. A. 6th Cir.), 103 Fed.
Rep. 932, 43 C. C. A. 377, 4 Am.
B. R. 192; Burnham v. Street Ry.
Co., 87 Fed. Rep. 168, 30 C. C. A.
594. See also Penn. Co. v. Jacksonville, etc. Ry. Co., 55 Fed. Rep. 131, 5 C. C. A. 53; Florida Cent.
R. R. Co. v. Schutte, 100 U. S. 644, 647, 25 L. Ed. 605; Lamb Knit Goods Co. v. Lamb Glove & Mitten Co. (C. C. A. 6th Cir.), 120
Fed. Rep. 267, 273, 56 C. C. A. 547;
Shaffer v. Koblegard Co. (C. C. A.

certificate in such case should be that it is a true and correct transcript, according to the præcipe. If the attorney for the appellee asks him to include other parts of the record in the transcript, he may apply to the court of bankruptcy for directions in respect to such matter.<sup>10</sup>

Where the record is filed in an appellate court and is made to appear by the appellee that necessary papers, etc., have been omitted in making the transcript, they may be supplied upon application to that court.<sup>11</sup> Where witnesses are examined orally, the testimony presented in that form or its substance must be stated in writing and made a part of the record, or it will be entirely disregarded on appeal.<sup>12</sup> Exhibits attached to depositions are properly included in a record.<sup>18</sup> The fact that evidence is not included in the transcript is not a sufficient reason to dismiss the appeal.<sup>14</sup> The remedy is a writ of *certiorari* to bring up the omitted parts of the record of the court below if necessary to the hearing in the appellate court.<sup>15</sup> The opinion of the court of bankruptcy, if in writing, should be annexed to the transcript.<sup>16</sup>

4th Cir.), 183 Fed. Rep. 71, 105
C. C. A. 363, 24 Am. B. R. 898.
10 Hoe v. Kahler, 27 Fed. Rep. 145.

But see *In re* Robertshaw Mfg. Co., 135 Fed. Rep. 220, 14 Am. B. R. 341.

<sup>11</sup> Florida Cent. R. R. Co. v. Schutte, 100 U. S. 644, 647, 25 L. Ed. 605.

See also Certiorari to complete record, Sec. 844, post.

12 Williams Bros. v. Savage (C.
C. A. 4th Cir.), 120 Fed. Rep. 497,
57 C. C. A. 647, 9 Am. B. R. 720;
Blease v. Garlington, 92 U. S. 1,
23 L. Ed. 521. See Rule of May
15, 1893, 149 U. S. 793.

<sup>13</sup> Clark Thread Co. v. Willimantic Linen Co., 140 U. S. 481, 35 L. Ed. 521.

Taft & Co. v. Century Sav. Bank (C. C. A. 8th Cir.), 141 Fed. Rep. 369, 72 C. C. A. 671, 15 Am. B. R. 594; Cunningham v. German Ins. Bank (C. C. A. 6th Cir.), 103 Fed. Rep. 932, 43 C. C. A. 377, 4 Am. B. R. 192; Flickinger v. First Nat. Bank (C. C. A. 6th Cir.), 145 Fed. Rep. 162, 76 C. C. A. 132, 16 Am. B. R. 678.

15 Keck Mfg. Co. v. Lorsch (C. C. A. 6th Cir.), 179 Fed. Rep. 485.
103 C. C. A. 65, 24 Am. B. R. 705.
16 Rule 14, C. C. A.; Teller v. United States (C. C. A. 8th Cir.),
111 Fed. Rep. 119, 49 C. C. A. 263.

The transcript must be authenticated under the seal of the court and be signed by the clerk.<sup>17</sup> Where the certificate is under the seal of the court it may be amended by adding the signature of the clerk.<sup>18</sup>

In the case of a writ of error a bill of exceptions is necessary to bring up the evidence and rulings of the court during the trial. It is not necessary when the errors complained of are patent on the face of the record. A bill of exceptions has no function and serves no purpose on an appeal from a decree in equity or bankruptcy. A judge of a court of bankruptcy is not required to make findings of fact for the record on an appeal from his decision.

#### § 843. Amendments to the record.

Where, from inadvertence or mistake of the clerk of the court below, or from any other cause, the record transmitted to the appellate court is defective or incorrect, the errors or mistakes are regularly corrected by a writ of *certiorari* to bring up a full and true transcript of the record.<sup>1</sup>

<sup>17</sup> Blitz v. Brown, 7 Wall, 693, 19
 L. Ed. 280.

A certificate signed "A. B., clerk of said court, by C. D., deputy," is\_ a sufficient signature; Garneau v. Dozier, 100 U. S. 7, 25 L. Ed. 536.

<sup>18</sup> Idaho & Ore. Land Imp. Co. v. Bradbury, 132 U. S. 509, 33 L. Ed. 433.

<sup>19</sup> Grant Shoe Co. v. Laird, 212
 U. S. 445, 53 L. Ed. 591, 21 Am.
 B. R. 484.

<sup>20</sup> Dodge v. Norlin (C. C. A. 8th Cir.), 133 Fed. Rep. 363, 66 C. C. A. 425, 13 Am. B. R. 176.

<sup>21</sup> In re Meyers, 105 Fed. Rep. 353, 5 Am. B. R. 4.

<sup>1</sup> See Sec. 844, post.

In Devries v. Shanahan (C. C. A. 4th Cir.), 122 Fed. Rep. 629, 58

C. C. A. 482, 10 Am. B. R. 518, the court said: "The record in this case, whilst it suggests facts material to its consideration, does not set them forth as clearly as is necessary to its decision. It is, therefore, ordered that the cause be remanded to the district court, with instructions to require all the facts connected with the failure to prove and prosecute the claim of the estate of John M. Orem, deceased, against the bankrupt estate of W. Morris Orem, prior to the petition of the appellee, to be inquired into and reported to it, and, when such facts are so reported, to pass upon the same."

In Barber v. Coit (C. C. A. 6th Cir.), 118 Fed. Rep. 272, 55 C. C.

The clerk of the court of bankruptcy may supply an omission in a record by certifying such omitted parts without an order of court.<sup>2</sup> He can not in this matter correct an erroneous statement in a transcript.<sup>3</sup>

Appeals are heard upon the pleadings and proofs below. No new evidence can be admitted, and the record will not ordinarily be amended in the appellate court.<sup>4</sup> It is true, an amendment may be had in the appellate court by consent of parties,<sup>5</sup> and so also amendments have been allowed in the appellate court to substitute the name of an officer as appellant in place of his predecessor in office; <sup>6</sup> and where it appeared by the certificate of the clerk that he had committed a clerical error in the transcript it was corrected in the appellate court

A. 145, the following order was made: "The decree of the district court of the United States is reversed and the cause remanded to said court, with directions that the cause be remitted to the referee by said court with directions that he take proof of the pleadings in said Ohio case, and that upon the record as thus completed the referee proceed to rehear the matter. This order is made because the case is not properly prepared for decision and because great injustice may be done if the cause is to be decided on present record. order is made upon our own motion on authority of Estho v. Lear, 7 Pet. 130-1, 8 L. Ed. 632, and Illinois Cent. Rd. v. Illinois, 146 U. S. 387, 36 L. Ed. 1018. The costs of this appeal will be diveded."

<sup>2</sup> Crandall v. Nevada, 6 Wall. 35, 18 L. Ed. 744, 745.

<sup>3</sup> Hudgins v. Kemp, 18 How. 530,-15 L. Ed. 511, 514.

4 Pacific R. Co. v. Ketchum, 95 U. S. 1, 24 L. Ed. 347; Udall v. Steamship "Ohio," 17 How. 17, 15 L. Ed. 42; Hudgins v. Kemp, 18 How. 530, 15 L. Ed. 511, 514; The Protector, 11 Wall. 82, 20 L. Ed. 47.

In Kennedy v. Bank of Georgia, 8 How. 610, 12 L. Ed. 1209, the supreme court said: "There is nothing in the nature of appellate jurisdiction, proceeding according to the common law, which forbids the granting of amendments, etc., but the practice has been to remand the cause to the lower court for amendment." See also Denny v. Pironi, 141 U. S. 121, 35 L. Ed. 657; Metcalf v. Watertown, 128 U. S. 586, 32 L. Ed. 543; Tug River Coal & Salt Co. v. Brigel, 67 Fed. Rep. 625, 14 C. C. A. 577, remanded and amendment allowed in circuit court in 73 Fed. Rep. 13

As was done in Fletcher v. Peck,Cranch, 87, 3 L. Ed. 162.

<sup>6</sup> Bowden v. Johnson, 107 U. S. 251, 27 L. Ed. 386; Gates v. Goodloe, 101 U. S. 612, 25 L. Ed. 895; United States v. Hopewell, 51 Fed. Rep. 798, 2 C. C. A. 510.

without issuing a writ of *certiorari*.<sup>7</sup> Amendments have been allowed to be made to the record to allege the amount in dispute, where no objection to the omission was made in the trial court.<sup>8</sup>

## § 844. Certiorari to complete records.

The Revised Statutes authorize the supreme court to "issue writs not specifically provided by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." i

Under this provision the writ of *certiorari* has not been used as freely by the supreme court as by the court of queen's bench in England.<sup>2</sup> It has been used as an auxiliary process only, to supply imperfections in a record of a case already before it; and, not like a writ of error, to review the judgment of an inferior court.<sup>3</sup> It has never been used to bring up from an inferior court of the United States for trial a case within the exclusive jurisdiction of a higher court.<sup>4</sup>

The Evarts acts of March 3, 1891,<sup>5</sup> did not affect this power, and the supreme court may still issue writs of *certiorari* in proper cases.<sup>6</sup>

Woodward v. Brown, 13 Pet. 1,
 L. Ed. 31.

<sup>8</sup> Giles v. Harris, 189 U. S. 475; Fuller v. Montag (C. C. A. 6th Cir.), 59 Fed. Rep. 212, 8 C. C. A. 100.

But see Newcomb v. Burbank (C. C. A. 2d Cir.), 181 Fed. Rep. 334, 104 C. C. A. 164, and cases cited in opinion.

<sup>1</sup> R. S. Sec. 716.

<sup>2</sup> Ex parte Vallandigham, 1 Wall. 243, 249, 17 L. Ed. 589.

Luxton v. North River Bridge
147 U. S. 337, 37 L. Ed. 194; United
States v. Young, 94 U. S. 258, 24
L. Ed. 153; Ex parte Gordon, 1
Black, 503, 17 L. Ed. 134; Barton v.
Petit, 7 Cranch, 288, 3 L. Ed. 347;
Beach's Mod. Eq. Prac., Sec. 963.

<sup>4</sup> Ex parte Hitz, 111 U. S. 766, 28 L. Ed. 592; Patterson v. United States, 2 Wheat, 221, 4 L. Ed. 224; Fowler v. Lindsey, 3 Dall. 411, 1 L. Ed. 658; In re Tampa Suburban R. R. Co., 168 U. S. 583, 42 L. Ed. 589

<sup>5</sup> 26 Stat. at L. 826.

American Const. Co. v. Jackson-ville Ry. Co., 148 U. S. 380, 37 L.
Ed. 486. Sup. Ct., Rule 14.

In re Chetwood, 165 U. S. 443, 41 L. Ed. 782, a writ of certiorari was allowed to bring up the record so that the order adjudging Chetwood and his counsel in contempt for being concerned in suing out writs of error and directing them, or either of them, to refrain from prosecuting the same, might be re-

The circuit courts of appeals are vested, by the act creating them, with the power to grant writs of *certiorari* for the purpose of supplying omissions or curing defects in a record in a case pending in one of these courts. Under this provision the circuit courts of appeals have frequently issued writs of *certiorari* for such purposes, although the cases are rarely, if ever, reported.

The application for a writ of *certiorari* to supply an omission or cure a defect in a record should be made to the court in which the case is pending. It is usually made by petition, entitled in the court and cause and addressed to the court. It should state the defect or parts claimed to be omitted, and pray for a writ of *certiorari* to issue. The petition should be signed and verified.

If a proper showing is made, the court will ordinarily order a writ to issue, directed to the court below, commanding it to return a true and complete record, including the omitted or defective parts, if any there be.<sup>8</sup> The order also regularly contains a direction to the clerk of the appellate court to also return the transcript for the purpose of being corrected. The court will not usually order the alleged omitted portions or the defective portions to be corrected. If the record is faulty it should be made to conform to the record below by certifying the corrections to be made. The appellate court will not undertake to make a record in the inferior court.

The writ of *certiorari* is regularly issued under the hand and seal of the clerk of the appellate court, and is transmitted to the clerk of the court below, together with the transcript

vised and annulled. This case is explained in Tampa Southern R. R. Co., 168 U. S. 587, 42 L. Ed. 589.

<sup>7</sup> Act of March 3, 1891, 26 Stat. at L. 826, Sec. 12, provides "that the circuit court of appeals shall have the powers specified in section seven hundred and sixteen of the Revised Statutes of the United

States." Rule 18, C. C. A., 90 Fed. Rep. clx. See also Loveland's Forms Fed. Prac., Nos. 1477 and 1478.

<sup>8</sup> The Keck Mfg. Co. v. Lorsch (C. C. A. 6th Cir.), 179 Fed. Rep. 485, 103 C. C. A. 65, 24 Am. B. R. 705. and a copy of the petition, setting forth the alleged defects or omissions in the record. The clerk of the inferior court thereupon compares the transcript with the original record, and returns the writ with a certified correction, or a certified copy of the omitted papers, or with a certificate to the effect that the record is true and complete, or such other facts as may be necessary for a full understanding of the matter. This is returned under the seal of the court. It is not necessary to have the return made by the judge.<sup>9</sup> It is regularly made by the clerk.

If a party insists upon including in the record unnecessary matter the court may prevent injustice being done in dealing with the costs.<sup>10</sup>

# § 845. Perfecting an appeal or writ of error and filing the record.

An appeal is taken and a writ of error sued out within the contemplation of the statute when it is allowed and the papers filed in the clerk's office. The taking of an appeal deprives the court of bankruptcy of jurisdiction to further consider matters involved in the appeal. It can only assist in perfecting the appeal. An appeal does not affect its jurisdiction over other matters in the proceedings from which no appeal is taken. Perfecting an appeal or writ of error by giving a bond, issuing and serving a citation, and filing the record in the appellate court is essential to the prosecution of a suit in an appellate court.

It is the duty of the appellant or plaintiff in error to file the record with the clerk of the appellate court by or before the return day, whether in vacation or in term time.<sup>4</sup> The

Stewart v. Ingle, 9 Wheat. 526,L. Ed. 151.

 <sup>&</sup>lt;sup>10</sup> Union Pac. Railway Co. v.
 Stewart, 95 U. S. 279, 284, 24 L.
 Ed. 431; The Keck Mfg. Co. v.
 Lorsch (C. C. A. 6th Cir.), 179
 Fed. Rep. 485, 103 C. C. A. 65, 24
 Am. B. R. 705.

<sup>&</sup>lt;sup>1</sup> Secs. 834 and 835, ante.

<sup>&</sup>lt;sup>2</sup> Sec. 839, ante.

<sup>&</sup>lt;sup>3</sup> Sec. 841, ante.

<sup>&</sup>lt;sup>4</sup> Rule 16, C. C. A. 90 Fed. Rep. clix; Sutherland v. Pearce (C. C. A. 9th Cir.), 186 Fed. Rep. 783, 108 C. C. A. 653; *In re* Alden Electric Co. (C. C. A. 7th Cir.), 123

appeal and citation must be made returnable not exceeding thirty days from the date of the signing of the citation.<sup>5</sup> The time for filing the record may be enlarged before its expiration by the justice or judge who signed the citation, or any judge of the appellate court, and the order of enlargement should be filed with the clerk of the appellate court.<sup>6</sup> This rule is directory, and it is within the sound discretion of the appellate court to relieve parties who have not complied with it.<sup>7</sup>

If the record is not filed within the next term succeeding the allowance of the appeal, the appeal has spent its force and should be dismissed.<sup>8</sup> One term is held annually by the circuit court of appeals in the several judicial circuits.<sup>9</sup> Where the appellant without fault on his part is prevented from filing the transcript within such time by the fraud of his opponent or the contumacy of the clerk or the order of the court below, his time to file the transcript may be enlarged by the appellate court.<sup>10</sup> Where the record is filed at the next term, but after the return day, or the time as enlarged for filing it, and before a motion to dismiss is filed,

Fed. Rep. 415, 59 C. C. A. 509, 10 Am. B. R. 370.

See also Pender v. Brown (C. C. A. 4th Cir.), 120 Fed. Rep. 496, 50 C. C. A. 646, 56 C. C. A. 646.

<sup>5</sup> Rule 14, C. C. A., 90 Fed. Rep. clviii.

<sup>6</sup> Rule 16, C. C. A., 90 Fed. Rep. clix.

An order extending the time for filing the record on appeal, made after the time had expired, is ineffective. *In re* Alden Electric Co. (C. C. A. 7th Cir.), 123 Fed. Rep. 415, 59 C. C. A. 509, 10 Am. B. • R. 370.

No other judge is entitled to extend the time for filing record; West v. Irwin, 54 Fed. Rep. 419, 4 C. C. A. 401.

<sup>7</sup> Florida v. Charlotte Harbor Phosphate Co., 70 Fed. Rep. 883, 17 C. C. A. 472; Sutherland v. Pearce (C. C. A. 9th Cir.), 186 Fed. Rep. 783, 108 C. C. A. 653.

<sup>8</sup> Wauton v. DeWolf, 142 U. S. 138, 35 L. Ed. 965; Evans v. State Bank, 134 U. S. 330, 3 L. Ed. 917; Grigsby v. Purcell, 99 U. S. 505, 25 L. Ed. 354.

at L. 826, Sec. 3, reenacted as Sec. 126 of the Judicial Code, Act of March 3, 1911, 36 Stat, at L. 1087.

In some circuits more than one term is held. Pender v. Brown (C. C. A. 4th Cir.), 120 Fed. Rep. 496, 56 C. C. A. 646.

See United States v. Gomez,
 Wall. 752, 18 L. Ed. 212; Ableman v. Booth, 21 How. 506, 512,
 L. Ed. 169.

the objection that the record was not filed in time is not sufficient to dismiss the appeal.<sup>11</sup>

If the appellant fails to file his record on or before the return day, the appellee may have the case docketed and dismissed upon producing the certificate, whether in term time or in vacation, from the clerk of the court of bankruptcy, stating the case and certifying that such appeal has been duly allowed.<sup>12</sup> In no case is the applicant entitled to docket the case and file the record after the same has been docketed and dismissed, unless by order of the court.<sup>13</sup>

The appellee may, at his option, docket the case and file a copy of the record with the clerk of the appellate court; and if the case is docketed and a copy of the record filed with the clerk of the appellate court by the appellant within the period limited and prescribed by the rules or by the appellee at any time thereafter, the case shall stand for argument at the term.<sup>14</sup>

Upon filing the transcript of record the appearance of counsel for the party docketing the case must be entered.<sup>15</sup>

Filing the record and docketing the case in the appellate court confers jurisdiction upon that court of that case. The trial court has no power to enter orders affecting the matter involved on the appeal thereafter. <sup>16</sup>

11 Bingham v. Morris, 7 Cranch, 99, 3 L. Ed. 281; Farmers Loan & Trust Co. v. Chicago N. P. R. Co., 73 Fed. Rep. 314, 19 C. C. A. 477; Altenberg v. Grant, 83 Fed. Rep. 980, 28 C. C. A. 244; Jones v. Mann, 72 Fed. Rep. 85, 18 C. C. A. 442; Andrews v. Thum, 64 Fed. Rep. 149, 12 C. C. A. 77; West Chicago St. R. R. Co. v. Ellsworth, 77 Fed. Rep. 664, 23 C. C. A. 393; Nashua & Lowell R. Corp. v. Boston & Lowell R. Corp., 61 Fed. Rep. 237, 9 C. C. A. 468.

<sup>12</sup> Rule 16, C. C. A., 90 Fed. Rep. clx. See Loveland's Forms of Fed. Prac., Form No. 1490.

This was done *In re* Alden Electric Co. (C. C. A. 7th Cir.), 123 Fed. Rep. 415, 59 C. C. A. 509, 10 Am. B. R. 370.

<sup>18</sup> Rule 16, C. C. A., 90 Fed. Rep. clx; Florida v. Charlotte Harbor Phosphate Co., 70 Fed. Rep. 883, 17 C. C. A. 472.

<sup>14</sup> Rule 16, C. C. A., 90 Fed. Rep. clx.

<sup>15</sup> Rule 16, C. C. A. 90 Fed. Rep. clx.

16 First Nat. Bank v. State Nat.
Bank (C. C. A. 9th Cir.), 131 Fed.
Rep. 430, 65 C. C. A. 413, 12 Am.
B. R. 440. See also Aspen Min.

## § 846. Proceedings in a circuit court of appeals.

The practice in a circuit court of appeals is generally substantially the same as that of the supreme court of the United States. In certain respects it has been changed by rules.

When a transcript of record is filed in the office of the clerk it is his duty to docket the case. He enters upon a docket all the cases brought to and pending in the court in their proper chronological order.

The transcript of the record is then printed in the manner prescribed by the rules of the circuit court of appeals in which the case is pending. The printing rules vary in the several courts. In the case of an appeal or writ of error from a final judgment or decree twenty-five printed records may be filed by the party removing the case into the circuit court of appeals. This act does not apply to petitions for revision or appeals from interlocutory orders in bankruptcy.

Printed briefs are required. The number of briefs, what they shall contain, and the time within which they must be filed is prescribed by the rules of the several circuit courts of appeals.<sup>3</sup>

Counsel must also examine the rules of the particular court in which a case is pending with reference to the time allowed for argument and the manner of setting the case for hearing.

Co. v. Billings, 150 U. S. 31, 37 L. Ed. 986.

<sup>1</sup> See Rule 23, C. C. A.

<sup>2</sup> Act of Feb. 15, 1910, 36 Stat. at

<sup>3</sup> Rule 24, C. C. A.; Van Gunden v. Iron Co., 52 Fed. Rep. 838, 3 C. C. A. 294; City of Lincoln v. Sun Vapor Street Light Co., 59 Fed. Rep. 756, 8 C. C. A. 253; Vider v. O'Brien, 62 Fed. Rep. 326, 10 C. C. A. 385; Texas & P. Ry. Co. v. Reeder, 76 Fed. Rep. 550, 22 C. C. A. 314; Doe v. Mining Co., 70 Fed. Rep. 455, 17 C. C. A. 190.

In City of Milwaukee v. Schailer

& Schniglau Co., 91 Fed. Rep. 858, 34 C. C. A. 112, the circuit court of appeals for the seventh circuit said: "Error is assigned upon the several rulings stated, but the brief for the appellant does not contain, as required by rule 24, 'a specification of the errors relied upon.' The intention of that rule is that the brief shall contain, in the order stated, (1) a statement of the case, (2) a specification of errors relied upon, and (3) a brief of the argument. Each of these should be under an appropriate heading, in enlarged type."

The general rule is that when a petitioner or appellant is in default for brief when the case is called it may be dismissed on motion.<sup>4</sup> The court has allowed an appellant in default for brief at the time of hearing additional time within which to file a brief under penalty of having the appeal dismissed.<sup>5</sup> When a respondent or appellant is in default the court will hear the counsel for the petitioner or appellant, but will not permit argument by counsel for the respondent or appellee, except on consent of his adversary and by request of the court.<sup>6</sup>

## § 847. Scope of the review on appeal and writ of error.

It should be observed that it is the decision of the district judge and the record of the trial before him which is brought into the appellate court for review.<sup>1</sup>

On an appeal in equity the whole case is open for review in the appellate court. The statute provides for appeals in bankruptcy "as in equity cases." On an appeal in bankruptcy or equity the whole case is open for review in the appellate court.<sup>2</sup>

An appellant will not be allowed to urge error as a ground for reversal unless contained in an assignment of errors as provided by rule 11.<sup>3</sup> An appellee may urge any ground in support of the decision to be reviewed whether it was pre-

- <sup>4</sup>Rule 24, C. C. A.; Portland Co. v. United States, 15 Wall. 1, 21 L. Ed. 113; Ryan v. Koch, 17 Wall. 19, 21 L. Ed. 611.
- <sup>5</sup> Fitch v. Richardson (C. C. A. 1st Cir.), 147 Fed. Rep. 196, 77 C. C. A. 422, 16 Am, B. R. 835.
  - 6 Rule 24, C. C. A.
- <sup>1</sup> Vehon v. Ullman (C. C. A. 7th Cir.), 147 Fed. Rep. 694, 78 C. C. A. 82, 17 Am. B. R. 435.
- <sup>2</sup> B. A. 1898, Sec. 25*a*; Elliott v. Toeppner, 187 U. S. 327, 335, 47

- L. Ed. 200, 9 Am. B. R. 50; Merchants Bank v. Cole (C. C. A. 6th Cir.), 149 Fed. Rep. 708, 79 C. C. A. 414, 18 Am. B. R. 44.
- <sup>3</sup> Lockman v. Lang (C. C. A. 8th Cir.), 128 Fed. Rep. 279, 62 C. C. A. 550, 11 Am. B. R. 597; Flickinger v. Nat. Bank (C. C. A. 6th Cir.), 145 Fed. Rep. 162, 76 Fed. Rep. 132, 16 Am. B. R. 676; Acme Food Co. v. Meier (C. C. A. 6th Cir.), 153 Fed. Rep. 74, 82 C. C. A. 208, 18 Am. B. R. 550.

sented to the court below or not.<sup>4</sup> A judgment may be right although the reasons assigned may not be sound. An appellee will not be permitted to challenge the judgment in any respect unless he has prosecuted a cross-appeal.<sup>4</sup>

On an appeal the appellate court will review both law and facts as distinguished from the supervisory jurisdiction where only questions of law are subject to review. Findings of fact, dependent upon conflicting testimony, by a judge, master, or a referee, who sees and hears the witnesses testify, have every reasonable presumption in their favor and will not be set aside or modified unless it clearly appears that there was error or mistake on his part. Where new evidence is introduced before the judge he hears the matter *de novo* and de-

<sup>4</sup> Board of Commissioners v. Hurley (C. C. A. 8th Cir.), 169 Fed. Rep. 92, 94, 94 C. C. A. 362, 22 Am. B. R. 209; Naylor & Co. v. Christiansen Harness Co. (C. C. A. 6th Cir.), 158 Fed. Rep. 290, 85 C. C. A. 522, 19 Am. B. R. 789; Guarantee Co. v. Phoenix Ins. Co. (C. C. A. 8th Cir.), 124 Fed. Rep. 170, 59 C. C. A. 376; McGahan v. Anderson (C. C. A. 4th Cir.), 113 Fed. Rep. 115, 51 C. C. A. 92, 7 Am. B. R. 641.

<sup>5</sup> Courier-Journal Job Printing Co. v. Brewing Co. (C. C. A. 6th Cir.), 101 Fed. Rep. 699, 4 Am. B. R. 183; Rush v. Lake (C. C. A. 9th Cir.), 122 Fed. Rep. 561, 10 Am. B. R. 455; *In re* Rouse, Hazard & Co. (C. C. A. 7th Cir.), 91 Fed. Rep. 96, 1 Am. B. R. 234.

In First National Bank v. Title & Trust Co., 198 U. S. 280, 291, 49 L. Ed. 1051, 14 Am. B. R. 102, the supreme court said: "But this was an appeal and not a petition for revision, and hence it was that the circuit court of appeals reviewed the questions of fact and declined

to accept the findings of the referee and the district court. In the exercise of supervisory power, it would have been confined to matter of law."

<sup>6</sup> Stephens v. Merchants National Bank (C. C. A. 7th Cir.), 154 Fed. Rep. 341, 83 C. C. A. 119, 18 Am. B. R. 560; In re Straschnow (C. C. A. 2d Cir.), 181 Fed. Rep. 337, 104 C. C. A. 167, 24 Am. B. R. 948; Vehon v. Ullman (C. C. A. 7th Cir.), 147 Fed. Rep. 694, 78 C. C. A. 82, 17 Am. B. R. 435; Smith v. National Suffolk Bank (C. C. A. 1st Cir.), 127 Fed. Rep. 286, 11 Am. B. R. 506; Barton Bros. v. Texas Produce Co. (C. C. A. 8th Cir.), 136 Fed. Rep. 355, 14 Am. B. R. 502; Southern Pine Co. v. Savannah Trust Co. (C. C. A. 5th Cir.), 141 Fed. Rep. 802, 15 Am. B. R. 608, and cases collated in the opinion. West v. McLaughlin (C. C. A. 6th Cir.), 162 Fed. Rep. 124, 89 C. C. A. 124, 20 Am. B. R. 624; Houck v. Christy (C. C. A. 8th Cir.), 152 Fed. Rep. 612, 81 C. C. A. 602, 18 Am, B. R. 330.

cides the controversy as upon an original hearing, the appellate court will review the evidence before the judge.<sup>7</sup> If the findings of fact by a judge and a referee differ, the appellate court will ordinarily examine the evidence for itself, but if the findings of fact of a referee and a judge are the same, the facts will not usually be inquired into by the appellate court.<sup>7</sup>

A writ of error brings up for review matters of law only, as distinguished from an appeal, which brings up both law and fact.<sup>8</sup> The verdict of a jury, or the finding of fact by the judge in case a jury is waived, on which judgment is entered concludes the issues of fact and the judgment is reviewable only for error of law.

## § 848. The decree or judgment of a circuit court of appeals.

The decree or judgment of an appellate court is regularly an affirmance, reversal or modification of the decree or judgment of the court below.

The decree should provide for the costs and may allow interest in a proper case.<sup>1</sup> It may contain a direction to the court below with reference to further proceedings to be taken by the court of bankruptcy.

<sup>7</sup> Merchants Nat. Bank v. Cole (C. C. A. 6th Cir.), 149 Fed. Rep. 708, 79 C. C. A. 414, 18 Am. B. R. 44; Ridings v. Johnson, 128 U. S. 212, 218, 32 L. Ed. 401; Naylor & Co. v. Christiansen Harness Mfg. Co. (C. C. A. 6th Cir.), 158 Fed. Rep. 290, 293, 85 C. C. A. 522, 19 Am. B. R. 789.

<sup>8</sup> Elliott v. Toeppner, 187 U. S. 327, 334, 47 L. Ed. 200, 9 Am. B. R. 50; Dover v. Richards, 151 U. S. 658, 663, 38 L. Ed. 305; Duncan v. Landis (C. C. A. 3d Cir.), 106 Fed. Rep. 839, 45 C. C. A. 666, 5 Am. B. R. 649.

<sup>1</sup> In Hutchinson v. Otis (C. C. A. 1st Cir.), 115 Fed. Rep. 937, 53 C. C. A. 419, 8 Am. B. R. 382, the court

said: "Ordinarily, an appellant, or other party, who has postponed by a proceeding in an appellate tribunal the payment of an amount justly due. should pay damages therefor equal, at least, to legal interest, even if he has not received any increment of the fund corresponding thereto. In Hutchinson v. Le Roy (C. C. A. 1st Cir.), 8 Am, B. R. 20, 113 Fed. 202, 51 C. C. A. 159, we allowed interest against the petitioner; but there the fund which it was determined belonged to him, had been field adversely from the outset, as it grew out of a tort of the bankrupt which arose before proceedings in bankruptcy were commenced. In the present case, however, the fund came into The appellate court does not execute its own decrees, but directs the court of bankruptcy with reference to what should be done by it. The mandate is directed to the particular court which is constituted a court of bankruptcy from which the appeal was taken.

A petition for rehearing may, in the discretion of the court, be allowed at any time during the term, but will not be allowed after the end of the term at which the decree was entered.<sup>2</sup> The appellate court has no power to set aside or modify its judgment or decree after the term at which it was entered.<sup>3</sup>

The proper practice for a party who desires a rehearing is to submit a printed brief or petition or suggestion of the points thought important without oral argument.<sup>4</sup> No reply to the petition is allowed to the other side, nor does the court usually write an opinion when the petition is denied.<sup>5</sup> If the court so desire, it will order the adverse counsel to file a brief, showing why a rehearing should not be granted, or it may order the case to be reheard, or may modify its decree or opinion if it contains incorrect statements.<sup>6</sup>

the hands of the trustee in bank-ruptcy, not through any tort, but through the oversight of Otis, Wilcox & Co. The trustee merely held it until the courts could determine to whom it belonged, and the record does not show that the trustee has received any increment thereof. Under the circumstances, and as this appeal was taken by the trustee in his official capacity to settle a question involving substantial doubts, we think that interest should not be allowed."

<sup>2</sup> Hudson v. Guestier, 7 Cranch, 1, 3 L. Ed. 249; Rule 29, C. C. A.; Bushnell v. Crooke Min. & Smelting Co., 150 U. S. 83, 37 L. Ed. 1007, and cases there collated.

8 Loeser v. Savings Deposit Bank
& Trust Co. (C. C. A. 6th Cir.),
163 Fed. Rep. 212, 89 C. C. A. 642,
20 Am. B. R. 845; Messinger v.
Anderson (C. C. A. 6th Cir.), 171
Fed. Rep. 785, 796, 96 C. C. A. 445.
4 Public Schools v. Walker, 9
Wall. 603, 19 L. Ed. 650.

<sup>5</sup> Ambler v. Whipple, 23 Wall. 278, 282.

<sup>6</sup> Public Schools v. Walker, 9 Wall. 603, 19 L. Ed. 650; Brown v. Aspden, 14 How. 25, 14 L. Ed. 311.

As to bringing in new matter on a petition for rehearing, see Yazoo & Mississippi Valley R. Co. v. Adams, 181 U. S. 580, 582, 45 L. Ed. 1011.

### § 849. Death of a party. 1

Whenever, pending a writ of error or appeal in a circuit court of appeals, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the case is heard and determined as in other cases, and if such representatives do not voluntarily become parties then the other party may suggest the death on the record, and thereupon, on motion, obtain an order that, unless such representatives shall become parties within sixty days, the party moving for such order, if defendant in error, is entitled to have the writ of error or appeal dismissed; and if the party so moving shall be plaintiff in error, he shall be entitled to open the record and on hearing have the judgment or decree reversed if it be erroneous: Provided, however, that a copy of every such order shall be personally served on said representative at least thirty days before the expiration of such sixty days.

When the death of a party is suggested and the representatives of the deceased do not appear within ten days after the expiration of such sixty days, and no measures are taken by the opposite party within that time to compel their appearance, the case abates.

When either party to a suit in a circuit or district court of the United States desires to prosecute a writ of error or appeal to a circuit court of appeals from any final judgment or decree rendered in the circuit or district court, and at the time of suing out such writ of error or appeal the other party to the suit is dead and has no proper representative within the jurisdiction of the court which rendered such final judgment or decree, so that the suit can not be revived in that court, but has a proper representative in some state or territory of the United States, or in the District of Columbia, the party desiring such a writ of

<sup>&</sup>lt;sup>1</sup> Rule 19, C. C. A.

error or appeal may procure the same, and may have proceeding on such judgment or decree superseded or stayed in the same manner as is now allowed by law in other cases. and thereupon proceeds with such writ of error or appeal as in other cases. And within thirty days after the filing of the record in the appellate court the plaintiff in error or appellant must make a suggestion to the court, supported by affidavit, that the said party was dead when the writ of error or appeal was taken or sued out, and had no proper representative within the jurisdiction of the court which rendered such judgment or decree, so that the suit could not be revived in that court, and that said party had a proper representative in some state or territory of the United States, or the District of Columbia, and stating therein the name and character of such representative and the state or territory or district in which such representative resides; and upon such suggestion he may on motion obtain an order that, unless such representative shall make himself a party within ninety days, the plaintiff in error or appellant is entitled to open the record, and, on hearing, have the judgment or decree reversed if the same be erroneous: Provided, however, that a proper citation reciting the substance of such order is served upon such representative, either personally or by being left at his residence at least thirty days before the expiration of such ninety days: Provided, also, that in every such case, if the representative of the deceased party does not appear within ten days after the expiration of such ninety days, and the measures above provided to compel the appearance of such representative have not been taken within the time, as above required, by the opposite party, the case abates: And provided, also, that the said representative may at any time before or after said suggestion come in and be made a party to the suit, and thereupon the case proceeds and is heard and determined as in other cases.

#### § 850. Costs in the appellate court.

The question of costs in the appellate court is not governed by any statutory provision. The judgment for costs is awarded in the discretion of the court as justice and right may require.<sup>1</sup>

Costs are regularly awarded in favor of the prevailing party 2 or they may be divided in proportion as the court may direct, or neither party may be allowed costs in the appellate court.3

Costs are not taxed for or against the United States.<sup>4</sup> In the supreme court the expense of printing the record by the government is taxed against the losing party, except when the judgment is against the United States.<sup>5</sup>

It has often been decided that if a suit is dismissed for want of jurisdiction in the appellate court, no judgment for costs can be given. A different rule prevails when there has been a reversal because the court below did not have jurisdiction, as the appellate court has authority to correct the error of the trial court in taking jurisdiction. The appellate court has power to adjudge costs which are incident to a motion to dismiss, including the amount of the cost of printing the record and the clerk's fees in the appellate court.

The costs are taxed by the clerk from data in his office and no cost bill is required to be filed by counsel. The amount of the costs is included in the mandate and a bill of items taxed

- Mansfield, etc., R. Co. v. Swan,
  111 U. S. 379, 387, 28 L. Ed. 462;
  Texas & Pacific Ry. v. Interstate
  Transportation Co., 155 U. S. 585,
  590, 39 L. Ed. 271.
- · <sup>2</sup> Sup. Ct. Rule 24; C. C. A. Rule 31.
- <sup>3</sup> New England R. R. Co. v. Carnegie Steel Co. (C. C. A. 1st Cir.), 75 Fed. Rep. 54, 21 C. E. A. 210.
- <sup>4</sup> Sup. Ct. Rule 24; C. C. A. Rule 31, 90 Fed. Rep. clix.

- <sup>5</sup> Act of March 3, 1877, 19 Stat. at L. 344; R. R. Co. v. Collector, 96 U. S. 594, 24 L. Ed. 825.
- <sup>6</sup> Strader v. Graham, 18 How. 602, 15 L. Ed. 464; Hornthall v. Collector, 9 Wall. 560, 19 L. Ed. 560.
- <sup>7</sup> Turner v. Enrille, 4 Dall. 7, 1 L. Ed. 717; Winchester v. Jackson, 3 Cranch, 514, 2 L. Ed. 516; Mansfield, etc., R. R. Co. v. Swan, 111 U. S. 379, 387, 28 L. Ed. 462.
- 8 Bradstreet Co. v. Higgins, 114
   U. S. 262, 29 L. Ed. 176.

in detail is annexed thereto.9 The costs are collected in the court below, which may issue execution for them if necessary.

The costs in the appellate court include the statutory fees earned by the clerk filing papers, etc. 10 The expense of printing the record including printed exhibits, answers of respondents to petitions for review when answers are permitted, and the supervision fee prescribed by law for preparing the record for the printer, indexing the same, supervising the printing and distributing the printed records, is taxable as costs. 11 Where a party cause unnecessary parts of a record to be printed in an appellate court, the court may impose costs upon the guilty party as it thinks proper. 12 An attorney's fee of twenty dollars is taxable in favor of the attorney for the prevailing party. 18

The following items are not taxable as costs in the appellate court: the amount paid the clerk below for transcript of record, which is properly taxable in the court below as costs in the case; <sup>14</sup> or the amount paid a surety company for furnishing an appeal bond; <sup>15</sup> or disbursements for printing briefs. <sup>16</sup>

<sup>9</sup> Sup. Ct. Rule 24, clause 6; C. C. A. Rule 31.

<sup>10</sup> For statutory fees, see 169 U. S. 740.

<sup>11</sup> C. C. A. Rule 23; Lee Injector Co. v. Penberthy (C. C. A. 6th Cir.), 109 Fed. Rep. 964, 48 C. C. A. 760; Ex parte Hughes, 114 U. S. 548, 29 L. Ed. 281; Bradstreet Co. v. Higgins, 114 U. S. 262, 29 L. Ed. 176.

<sup>12</sup> Sup. Ct. Rule 10, clause 9; Railway Co. v. Stewart, 95 U. S. 279, 284, 24 L. Ed. 431; Ball & Socket Fastener Co. v. Kraetzer, 150 U. S. 111, 1188, 37 L. Ed. 1019; The Sarah (C. C. C. 5th Cir.), 52 Fed. Rep. 233, 3 C. C. A. 56. <sup>18</sup> Kansas City, etc., R. R. Co. v. McDonald (C. C. A. 8th Cir.), 60 Fed. Rep. 522, 9 C. C. A. 129; Shillito Co. v. McClung (C. C. A. 6th Cir.), 66 Fed. Rep. 22, 13 C. C. A. 284.

14 C. C. A. Rule 31, clause 3;
 Injector Co. v. Penberthy (C. C. A. 6th Cir.), 109 Fed. Rep. 964, 48
 C. C. A. 760.

<sup>15</sup> Lee Injector Co. v. Penberthy (C. C. A. 6th Cir.), 109 Fed. Rep. 964, 48 C. C. A. 760.

16 Ex parte Hughes, 114 U. S.
548, 29 L. Ed. 281; Lee Injector Co.
v. Penberthy (C. C. A. 6th Cir.),
109 Fed. Rep. 964, 48 C. C. A. 760.

#### § 851. The mandate.

When a case is finally determined, a mandate or other proper process in the nature of procedendo is issued to the court of bankruptcy for the purpose of informing that court of the proceedings in the appellate court, so that further proceedings may be had in court of bankruptcy as to law and justice may appertain. It is not necessary to recite in the mandate every step in the various stages of a cause. It should contain the decree of the appellate court and its directions to the court of bankruptcy.

The court of bankruptcy is bound by the decree contained in the mandate as the law of the case, and must carry it into execution according to the mandate.<sup>3</sup> That court can not vary it or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on the appeal, or intermeddle with it other than to settle so much as has been remanded.<sup>4</sup>

If the court of bankruptcy mistakes or misconstrues the decree of the circuit court of appeals and does not give full effect to the mandate, its action may be controlled either by a new appeal or by a writ of mandamus to execute the mandate.<sup>5</sup> The court of bankruptcy may consider and

<sup>&</sup>lt;sup>1</sup> Rule 32, C. C. A.

<sup>&</sup>lt;sup>2</sup> Andrews v. Thum, 72 Fed. Rep. 290, 18 C. C A. 566.

<sup>&</sup>lt;sup>3</sup> In re Hudson River Elec. Co., 184 Fed. Rep. 970, 25 Am. B. R. 873; In re Lennox, 181 Fed. Rep. 428, 24 Am. B. R. 922; In re Lesaius (C. C. A. 3d Cir.), 181 Fed. Rep. 690, 104 C. C. A. 588, 125 Am. B. R. 102.

<sup>&</sup>lt;sup>4</sup> In re Lesaius (C. C. A. 3d Cir.), 181 Fed. Rep. 690, 104 C. C. A. 588, 25 Am. B. R. 102; In re Lennox, 181 Fed. Rep. 428, 24 Am. B. R. 922; In re Hudson River Elec. Co., 184 Fed. Rep. 970, 25 Am. B. R.

<sup>873;</sup> Texas & Pac. Ry. v. Anderson, 149 U. S. 237, 37 L. Ed. 717; Sibbald v. United States, 12 Pet. 488, 492, 9 L. Ed. 1167.

<sup>&</sup>lt;sup>5</sup> Bissell Carpet Sweeper Co. v. Goshen Sweeper Co., 72 Fed. Rep. 519, 19 C. C. A. 25; In re Postal Telegraph Co., 85 Fed. Rep. 853, 29 C. C. A. 456; Perkins v. Fourniquet, 14 How. 313, 330, 14 L. Ed. 435; In re Washington & Georgetown R. R., 140 U. S. 91, 35 L. Ed. 339; City Bank v. Hunter, 152 U. S. 512, 38 L. Ed. 534; In re City Bank, Petitioner, 153 U. S. 246, 38 L. Ed. 705.

decide any matters left open by the mandate of the appellate court; and its decision of such matters can be reviewed by a new appeal only.<sup>6</sup> The opinion of the appellate court at the time of rendering its decree may be consulted to ascertain what was intended by its mandate; and either upon an application for a writ of mandamus or upon a new appeal, it is for the appellate court to construe its own mandate and to act accordingly.<sup>7</sup>

6 In re Sandford Fork & Tool
Co., 160 U. S. 247, 40 L. Ed. 414;
Hinckley v. Morton, 103 U. S. 764,
26 L. Ed. 458; Mason v. Pewabic
Co., 153 U. S. 361, 38 L. Ed. 745;
Nashua & Lowell R. R. v. Boston
& Lowell R. R., 51 Fed. Rep. 929,
5 U. S. App. 97.

<sup>7</sup> Gaines v. Rugg, 148 U. S. 228, 238, 244, 37 L. Ed. 432; Supervisors v. Kennicott, 94 U. S. 498, 24 L. Ed. 260; West v. Brashear, 14 Pet. 51, 10 L. Ed. 350.

#### CHAPTER XXXVIII.

#### THE SUPREME COURT.

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#### § 852. Jurisdiction in bankruptcy cases.

The jurisdiction of the supreme court in bankruptcy cases is appellate only. This is true whether its jurisdiction is invoked in bankruptcy proceedings proper or in controversies at law or in equity growing out of the settlement of bankrupt estates.<sup>1</sup>

The appellate jurisdiction of the supreme court may be invoked by different methods, according to the nature of

<sup>&</sup>lt;sup>1</sup> B. A. 1898, Secs. 24 and 25.

the case and the court whose decision is carried up for review. The appellate jurisdiction extends to the following cases, namely:

First. An appeal may be taken to the supreme court from a final decree of a circuit court of appeals allowing or rejecting a claim under the bankrupt act in two classes of cases.<sup>2</sup>

Second. An appeal or writ of error lies to review a final decree or judgment of a circuit court of appeals in a controversy arising in bankruptcy in the supreme court, in the exercise of its general appellate jurisdiction, in cases where the decision of the circuit court of appeals is not made final by statute.<sup>3</sup>

Third. A writ of certiorari may be granted by the supreme court to bring up for review any judgment or decree of a circuit court of appeals in cases in which the decision of the circuit court of appeals is made final by statute.<sup>4</sup>

Fourth. A circuit court of appeals may certify to the supreme court any questions or propositions of law in any pending case, concerning which it desires the instruction of the supreme court for its proper decision.<sup>5</sup>

Fifth. An appeal or writ of error may be taken from the district courts direct to the supreme court in jurisdictional and constitutional cases.<sup>6</sup>

Sixth. A writ of error lies from the supreme court to review the final action of a state court in a suit at law or in equity growing out of the settlement of a bankrupt estate,

<sup>2</sup> B. A. 1898, Sec. 25b. Sec. 825, ante, and Sec. 824, post.

<sup>3</sup> Sec. 241 of the Judicial Code, Act of March 3, 1911, 36 Stat. at L. 1087, re-enacting in part Sec. 6 of the Act of March 3, 1891, 26 Stat. at L. 826. See Sec. 856, post.

<sup>4</sup>B. A. 1898, Sec. 25d. Sec. 240 of the Judicial Code, Act of March 3, 1911, 36 Stat. at L. 1087, reenacting in part Sec. 6 of the Act

of March 3, 1891; 26 Stat. at L. 826. See Sec. 859, post.

<sup>6</sup> B. A. 1898, Sec. 25d. Sec. 239 of the Judicial Code, Act of March 3, 1911, 36 Stat. at L. 1087, reenacting in part Sec. 6 of the Act of March 3, 1891, 26 Stat. at L. 826. See Sec. 866, post.

<sup>6</sup> Sec. 238 of the Judicial Code, act of March 3, 1911, 36 Stat. at L. 1087, re-enacting in part Sec. 5 of in which is involved a federal question and the decision of the state court was against the right, title, privilege, etc., claimed under federal authority.<sup>7</sup>

Seventh. The supreme court is vested with appellate jurisdiction of controversies arising in bankruptcy proceedings from courts of bankruptcy not within any organized circuit of the United States and from the supreme court of the District of Columbia.8

The supreme court has no jurisdiction to superintend and revise in matter of law on a petition like the circuit court of appeals under section 24b.9

'A mandamus can not be used to serve the office of an appeal or writ of error.<sup>10</sup>

#### § 853. Taking a case to the supreme court in two ways.

Each of these forms of proceeding is exclusive of the others, that is to say, when the appellate jurisdiction of the supreme court may be invoked by one of these methods, it has no jurisdiction when another form of proceeding is used.

When the moving party is uncertain as to the nature of his remedy he may take the case to the supreme court in two ways. In such case the supreme court will select the proper proceeding and dismiss the other.<sup>1</sup>

In taking a case from the circuit court of appeals to the supreme court for review, if the moving party is uncertain whether the decision of the circuit court of appeals is final, he may prosecute an appeal or writ of error and also apply for a writ of certiorari.<sup>2</sup> If the writ of error or appeal is

the Act of March 3, 1891, 26 Stat. at L. 826. See Sec. 877, post.

<sup>7</sup> R. S. Sec. 709. See Sec. 881, bost.

<sup>8</sup> B. A. 1898, Sec. 24a. See Sec. 886, post.

Munsuri v. Fricker, 222 U. S. 121.
 In re Riggs, 214 U. S. 9, 53 L.
 Ed. 887, 22 Am. B. R. 720.

<sup>1</sup> Hurst v. Hollingsworth, 94 U. S. 111, 24 L. Ed. 31; Metropolitan R. R. Co. v. District of Columbia, 195 U. S. 322, 49 L. Ed. 219.

<sup>2</sup> Farrell v. O'Brien, 199 U. S. 89, 101, 50 L. Ed. 101; Cochran v. Montgomery County, 199 U. S. 260, 50 L. Ed. 182; Security Trust Co. v. Dent, 187 U. S. 237, 47 L. Ed.

not the proper form of proceeding it will be dismissed and a writ of *certiorari* may be granted. Otherwise the case will be considered on error or appeal and the writ of *certiorari* denied. Only one case need be docketed and one record filed, because when the supreme court allows the writ of *certiorari* it will direct that the copy of the record filed under the writ of error or appeal may be taken as a return to the *certiorari*.<sup>3</sup>

Two forms of appellate proceedings to review one action in the court below constitute but one case in the appellate court. One record is sufficient and it is not necessary to docket the case twice because it was brought both by appeal and writ of error,<sup>4</sup> or by appeal or writ of error and also by writ of *certiorari* to review a decision of a circuit court of appeals in the supreme court.<sup>5</sup>

# § 854. Appeals from Circuit Court of Appeals in bankruptcy proceedings proper.

When a case is taken to a circuit court of appeals by an appeal to review a judgment in a proceeding in bankruptcy proper, an appeal may be taken to the supreme court from a final decree of the circuit court of appeals allowing or rejecting a claim under the bankrupt act in two classes of cases:

158; Montana Min. Co. v. St. Louis Min. Co., 204 U. S. 204, 213, 51 L. Ed. 444.

<sup>3</sup> Security Trust Co. v. Dent, 187 U. S. 237, 47 L. Ed. 158; Farrell v. O'Brien, 199 U. S. 89, 101, 50 L. Ed. 101; Cochran v. Montgomery County, 199 U. S. 260, 274, 50 L. Ed. 182.

<sup>4</sup> Plymouth Min. Co. v. Amador Canal Co., 118 U. S. 264, 30 L. Ed. 232; Hurst v. Hollingsworth, 94 U. S. 111, 24 L. Ed. 31. <sup>5</sup> Only one case was docketed in the supreme court in Farrell v. O'Brien, 199 U. S. 89, 101, 50 L. Ed. 101; Security Trust Co. v. Dent, 187 U. S. 237, 47 L. Ed. 158; Montana Min. Co. v. St. Louis Min. Co., 204 U. S. 204, 213, 51 L. Ed. 444.

<sup>1</sup> B. A. 1898, Sec. 25b. Coder v. Arts, 213 U. S. 223, 53 L. Ed. 772. 22 Am. B. R. 1; Hutchinson v. Otis (C. C. A. 1st Cir.), 123 Fed. Rep. 14, 59 C. C. A. 94, 10 Am. B. R. 275, on appeal 190 U. S. 552, 47 L. Ed. 1179, 10 Am. B. R. 135.

First. Where the amount in controversy exceeds the sum of two thousand dollars and the question involved is one which might have been taken from the highest court of a state to the supreme court of the United States, or,

Second. Where some justice of the supreme court of the United States shall certify in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of the bankrupt act.

If a case comes within either class an appeal lies. If there is no certificate by a justice of the supreme court, an appeal will lie if the amount of the claim allowed or rejected exceeds \$2,000, and the question involved presents a case for the construction of the bankruptcy act, which might have been carried to the supreme court under section 709 of the Revised Statutes had the case been decided by the highest court of the state.<sup>2</sup> Cases which may be taken from a state court will be considered in another place and may be referred to for the purpose of determining the jurisdiction under this clause.<sup>3</sup>

If a certificate of a justice of the supreme court, as required in the second class of cases, is obtained, the amount involved, or whether the case could be taken from a state court or not, is immaterial.

If the case fails to come within either class no appeal lies from a decree of a circuit court of appeals in bankruptcy proceedings proper.<sup>4</sup> No appeal lies from a decree of that

<sup>2</sup> Coder v. Arts, 213 U. S. 223, 53 L. Ed. 772, 22 Am. B. R. 1; Hurley v. Atchison, etc., R. R. Co., 213 U. S. 126, 53 L. Ed. 729, 22 Am. B. R. 17; Wild v. Provident Life & Trust Co., 214 U. S. 292, 53 L. Ed. 1003, 22 Am. B. R. 109; Jaquith v. Alden, 189 U. S. 78, 47 L. Ed. 717, 9 Am. B. R. 773; Hutchinson v. Otis, 190 U. S. 552, 47 L. Ed. 1179, 10 Am. B. R. 135;

Page v. Edmunds, 187 U. S. 596, 47 L. Ed. 318, 9 Am. B. R. 277; Pirie v. Trust Co., 182 U. S. 438, 45 L. Ed. 1171, 5 Am. B. R. 814; Western Tie & Timber Co. v. Brown, 196 U. S. 502, 49 L. Ed. 571, 13 Am. B. R. 447.

<sup>8</sup> See Sec. 881, post.

4 Chapman v. Bowen, 207 U. S. 89, 52 L. Ed. 116, 18 Am. B. R. 844; Coder v. Arts, 213 U. S. 223,

court affirming or reversing a judgment adjudging or refusing to adjudge the defendant a bankrupt, or a judgment granting or denying a discharge, or confirming or refusing to confirm a composition.

No appeal lies from a decision of a circuit court of appeals on petition for revision.<sup>5</sup> Such decisions may be reviewed on writ of *certiorari*.<sup>6</sup>

#### § 855. Proceedings on appeal from C. C. A. under Section 25b.

An appeal from a decision of the circuit court of appeals in bankruptcy proceedings proper under section 25b of the act is taken upon filing petition and assignments of error with the clerk of the circuit court of appeals as in other cases.<sup>1</sup>

An appeal may be allowed by a judge of the circuit court of appeals or of the supreme court.<sup>2</sup> A citation must issue and be served and bond given as in other cases. The trustee is not required to give bond.<sup>3</sup>

The supreme court has regulated by rule, under authority of the statute, the time within which an appeal may be taken and what shall constitute the record in cases appealed under this clause.<sup>4</sup> These regulations have the same effect as if

53 L. Ed. 772, 22 Am. B. R. 1; Logan v. Farmer's Deposit Nat. Bank, 214 U. S. 500, 53 L. Ed. 1062; Blake v. Openhym, 216 U. S. 322, 54 L. Ed. 498, 23 Am. B. R. 616; Duryea Power Co. v. Sternbergh, 218 U. S. 299.

<sup>5</sup> Duryea Power Co. v. Sternbergh, 218 U. S. 299; Holden v. Stratton, 191 U. S. 115, 48 L. Ed. 116, 10 Am. B. R. 786.

<sup>6</sup> B. A. 1898, Sec. 25d. Sec. 859, post; Holden v. Stratton, 191 U. S. 115, 48 L. Ed. 116, 10 Am. B. R. 786; Louisville Trust Co. v. Com-

ingor, 181 U. S. 620, 45 L. Ed. 1031, and 184 U. S. 18, 46 L. Ed. 413, 7 Am. B. R. 421; Bryan v. Bernheimer, 175 U. S. 724, 44 L. Ed. 338, and 181 U. S. 188, 45 L. Ed. 814, 5 Am. B. R. 523; Mueller v. Nugent, 180 U. S. 640, 45 L. Ed. 711, and 184 U. S. 1, 46 L. Ed. 405, 7 Am. B. R. 224.

<sup>1</sup> Gen. Ord. 36. See Loveland's Forms of Fed. Prac., Nos. 1422, et seq.

<sup>2</sup> Gen. Ord. 36.

<sup>8</sup> B. A. 1898, Sec. 25c.

4 Gen. Ord. 36.

written in the statute.<sup>5</sup> If they are not complied with, the appeal will be dismissed by the supreme court.<sup>6</sup>

The appeal must be taken within thirty days after the judgment or decree appealed from.<sup>7</sup> The time begins to run from the entry of the original decree or judgment and when expired is not revived by a petition for rehearing.<sup>8</sup>

General order 36 also provides that in every case in which either party is entitled by the act to take an appeal to the supreme court, the court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon, stated separately; and the record transmitted to the supreme court of the United States on such an appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law.

This does not require the findings to be made without request, but is intended to give the party a right to such findings when he demands it.<sup>9</sup> The demand should be made either before the opinion of the court is given or before the judgment is entered. It is sufficient if the findings of fact and conclusions of law are made a part of the record by an order made within thirty days directing the same to be filed *nunc pro tunc* as of the date the judgment was entered.<sup>10</sup> These findings of fact and conclusions of law constitute the record on the appeal in the supreme court.

<sup>6</sup> Conboy v. First Nat. Bank, 203 U. S. 141, 51 L. Ed. 128, 16 Am. B. R. 773.

<sup>6</sup> Chapman v. Bowen, 207 U. S.
89, 52 L. Ed. 116, 18 Am. B. R. 844;
Conboy v. First Nat. Bank, 203 U.
S. 141, 51 L. Ed. 128, 16 Am. B. R.
773; Clevenger v. Chaney, 212 U.
S. 562, 53 L. Ed. 652.

<sup>7</sup> Gen. Ord. 36. Conboy v. First Nat. Bank, 203 U. S. 141, 51 L. Ed. 128, 16 Am. B. R. 773; Coder v. Arts, 213 U. S. 223, 53 L. Ed. 772, 22 Am. B. R. 1. <sup>8</sup> Conboy v. First Nat. Bank, 203
 U. S. 141, 51 L. Ed. 128, 16 Am. B.
 P. 773

<sup>9</sup> Knapp v. Milwaukee Trust Co.
(C. C. A. 7th Cir.), 162 Fed. Rep.
678, 679, 89 C. C. A. 467, 20 Am. B.
R. 671; Crucible Steel Co. v. Holt
(C. C. A. 6th Cir.), 174 Fed. Rep.
127, 130, 98 C. C. A. 101, 23 Am.
B. R. 306.

10 Coder v. Arts, 213 U. S. 223,53 L. Ed. 772, 22 Am. B. R. 1.

In an appeal of this character the supreme court will look only at the facts found by the circuit court of appeals. It will review only questions of law on appeals from the circuit court of appeals in bankruptcy proceedings proper. In this respect they differ from appeals calling for the exercise of its general appellate jurisdiction, which bring up fact as well as law for review.

# § 856. Appeals and writs of error to revise the decisions of the C. C. A. in controversies.

A judgment or decree of a circuit court of appeals in a controversy arising in bankruptcy may be reviewed in the supreme court on appeal or writ of error in the exercise of its general appellate jurisdiction where the matter in controversy exceeds \$1,000 besides costs.<sup>1</sup>

Controversies at law or in equity growing out of the settlement of bankrupt estates involve the construction of the bankrupt act. They are cases arising under the laws of the United States, in which the decision of the circuit court of appeals is not made final by statute.<sup>2</sup> For this reason there is of right an appeal or writ of error to the

11 Coder v. Arts, 213 U. S. 223,
 53 L. Ed. 772, 22 Am. B. R. 1.

<sup>1</sup> Sec. 241 of the Judicial Code, act of March 3, 1911, 36 Stat. at L. 1087, re-enacting in part Sec. 6 of the act of March 3, 1891, 26 Stat. at L. 826. Knapp v. Milwaukee Trust Co., 216 U. S. 545, 54 L. Ed. 610, 24 Am. B. R. 761; Hewit v. Berlin Mach. Wks., 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709; Manson v. Williams, 213 U. S. 453, 53 L. Ed. 869, 22 Am. B. R. 22; York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633; Security Warehousing Co. v. Hand, 206 U. S. 415, 51 L. Ed. 1117, 19 Am. B. R. 291.

<sup>2</sup> Sec. 128 of the Judicial Code, act of March 3, 1911, 36 Stat. at L. 1087, re-enacting in part Sec. 6 of the act of March 3, 1891, 26 Stat. at L. 826, provides that "the judgments and decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different states; also in all cases arising under the patent laws, under the copyright laws, under the revenue laws, and under the criminal laws, and in admiralty cases."

supreme court where the matter in controversy exceeds \$1,000 besides costs.3

It may be said generally that where a controversy arising in bankruptcy is reviewed by the circuit court of appeals on writ of error or appeal in the exercise of its general appellate jurisdiction under the code, it may be carried from that court to the supreme court. Such cases are suits at law and in equity growing out of the settlement of bankrupt estates, interventions to assert title to or a lien on the property in the possession of the trustee thereby raising a distinct and separable issue; and trials by jury in bankruptcy proceedings.

#### § 857. Whether appeal or writ of error lies.

Whether an appeal or writ of error is the proper method of reviewing the decision of a circuit court of appeals depends upon the nature of the case as originally tried in the district court.

If the case is one which is reviewable in a circuit court of appeals on writ of error the decision of that court is reviewable in the supreme court only on writ of error. If the case is one which is reviewable in the circuit court of appeals on appeal, the decision of that court is reviewable in the supreme court only on appeal. In other words, the same distinction between the right to a writ of error and

<sup>3</sup> Sec. 241 of the Judicial Code, act of March 3, 1911, 36 Stat. at L. 1087, re-enacting in part Sec. 6 of the act of March 3, 1891, 26 Stat. at L. 826.

<sup>4</sup> Thomas v. Sugarman, 218 U. S. 129; Page v. Rogers, 211 U. S. 575, 53 L. Ed. 332, 21 Am. B. R. 496; Bardes v. Hawarden Bank, 175 U. S. 576, 44 L. Ed. 261, 3 Am. B. R. 680; and 178 U. S. 524, 44 L. Ed. 1175, 4 Am. B. R. 163.

<sup>5</sup> Hewit v. Berlin Mach. Wks., 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709; Knapp v. Milwaukee Trust Co., 216 U. S. 545, 54 L. Ed. 610, 24 Am. B. R. 761; Security Warehousing Co. v. Hand, 206 U. S. 415, 51 L. Ed. 1117, 19 Am. B. R. 291.

<sup>6</sup> Consult Grant Shoe Co. v. Laird,
212 U. S. 445, 53 L. Ed. 591, 21 Am.
B. R. 484; Elliott v. Toeppner, 187
U. S. 327, 47 L. Ed. 200, 9 Am. B.
R. 50.

the right of appeal exists in taking a case from the circuit court of appeals to the supreme court that exists in removing the case into the circuit court of appeals.<sup>1</sup>

If a case is removed to the circuit court of appeals by writ of error, and that court dismisses the writ of error because the case can be reviewed only on appeal, it may be taken to the supreme court on writ of error. The supreme court will decide whether the circuit court had jurisdiction. If it finds that the circuit court of appeals had jurisdiction it may decide the whole case on its merits, because the case is in the supreme court to be finally determined. If it finds in any case that the circuit court of appeals was without jurisdiction it will reverse its decision, if necessary, and remand the case to the district court from which it was removed, with such directions as to further proceedings in that court as justice may require.

If a case is removed to the circuit court of appeals on appeal, and that court dismisses the appeal because the case can be reviewed only by writ of error, it may be taken to the supreme court on appeal. The supreme court will decide whether the circuit court of appeals had jurisdiction on appeal. If it finds that the circuit court of appeals had jurisdiction it may decide the whole case on its merits, because the case is in the supreme court to be finally determined. If it finds in any case that the circuit court of appeals was without jurisdiction it will reverse its decision, if necessary, and remand the case to the circuit or district court from which it was removed, with such directions as to further proceedings in that court as justice may require.

The case of First Nat'l Bank v. Title & Trust Co.<sup>2</sup> was taken on appeal to the circuit court of appeals and to the supreme court on writ of certiorari. The supreme court held that the circuit court of appeals had no jurisdiction of the

<sup>&</sup>lt;sup>1</sup> As to the distinction between an appeal and a writ of error, see Loveland's Appellate Jur. of the Federal Courts, Sec. 22.

<sup>&</sup>lt;sup>2</sup> 198 U. S. 280, 49 L. Ed. 1051, and 207 U. S. 61, 52 L. Ed. 103.

case on appeal. Its jurisdiction should have been invoked by petition for revision in bankruptcy. It reversed the decision of the circuit court of appeals, with directions to dismiss the appeal and remand the case to the district court for further proceedings in conformity with its opinion.

# § 858. Practice on appeal or writ of error to review a decision of the Circuit Court of Appeals in controversies.

An appeal or writ of error to review the decision of a circuit court of appeals in a controversy arising in bankruptcy is not governed by General Order 36, which is limited to bankruptcy proceedings proper.<sup>1</sup>

The appellate jurisdiction is under or is the same as that under the judicial code re-enacting the circuit court of appeals act of 1891.<sup>2</sup>

In a case taken from a circuit court of appeals to the supreme court, the appeal must be taken or the writ of error sued out within one year after the entry of the order, judgment or decree sought to be reviewed.<sup>3</sup>

A petition for an appeal or writ of error, together with an assignment of errors, are regularly filed with the clerk of the circuit court of appeals. These papers are then presented to the judge for allowance. The judge should fix the appeal bond and sign the citation. The judgment or decree of a circuit court of appeals may be superseded as in other cases, even in a case where no *supersedeas* is permitted by law on appeal to the circuit court of appeals.<sup>4</sup>

The writ of error or appeal may be allowed by a justice of the supreme court. In practice it is usually allowed by a judge of the circuit courts of appeals. This has been done

enacting in part Sec. 6 of the act of March 3, 1891, 26 Stat. at L. 826.

<sup>&</sup>lt;sup>1</sup>B. A. 1898, Sec. 24a. Knapp v. Milwaukee Trust Co., 216 U. S. 545, 54 L. Ed. 610, 24 Am. B. R. 761: Thomas v. Sugarman, 218 U. S. 129.

<sup>&</sup>lt;sup>2</sup> B. A. 1898, Sec. 24a: Sec. 241 of the Judicial Code, act of March 3, 1911, 36 Stat, at L. 1087, re-

<sup>&</sup>lt;sup>3</sup> Sec. 6 of the act of March 3, 1891, 26 Stat. at L. 826; Thomas v. Sugarman, 218 U. S. 129.

<sup>&</sup>lt;sup>4</sup> Louisville & Nashville R. Cc. v. Behlmer, 169 U. S. 644, 42 L. Ed. 889.

so frequently that it may be considered established practice, although there is no express provision of law authorizing it.

A writ of error issues out of the supreme court to the circuit court of appeals. It may be issued by the clerk of the supreme court. Formerly the clerk of the circuit court was authorized by section 1004 of the Revised Statutes to issue the writ for the clerk of the supreme court. The office of clerk of the circuit court is now abolished and the clerk of the district court is authorized to issue the writ for the clerk of the supreme court.<sup>5</sup> The clerk of the circuit court of appeals has no authority to issue the writ.

The record for the supreme court, on appeal or writ of error, is certified by the clerk of the circuit court of appeals. It is regularly made by adding to the printed record the proceedings in the circuit court of appeals. No special finding of fact and law is required as in cases appealed under section  $25\ b$  of the bankrupt act.<sup>6</sup>

If the case has been brought to the circuit court of appeals on several appeals, as from an interlocutory order granting an injunction or appointing a receiver, and then from a final decree, or several successive writs of error have been sued out in the same case, as where the case has been reversed and remanded, and a new trial had, the record on appeal or writ of error from a final decree or judgment may consist of all the records and proceedings which have been had in the circuit court of appeals; that is, the record includes the prior cases as well as the one from which the appeal or writ of error is prosecuted. The certificate of the clerk should state accurately what the record contains.

The record is filed in the office of the clerk of the supreme court. The proceedings in that court are governed by the general rules of practice of that court.

<sup>5</sup> See Sec. 834 ante.

<sup>&</sup>lt;sup>6</sup> Knapp v. Milwaukce Trust Co, 216 U. S. 545, 54 L. Ed. 610, 24 Am. B. R. 761.

#### § 859. Writs of certiorari from the supreme court.

The bankrupt statute authorizes the supreme court of the United States "to issue writs of certiorari pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted." This provision clearly adopts the same rule, with reference to removing a bankrupt case for review by writs of certiorari, that applies to other cases. The authority for the supreme court to issue such writs is found in the act of March 3, 1891.<sup>2</sup> This being the case the rule announced in other cases, with reference to when such writs may properly issue, will be useful in determining under what circumstances the writ may issue in bankruptcy, for the purpose of removing a case from a circuit court of appeals to the supreme court to be there reviewed.

There is no authority for issuing a writ of *certiorari* to remove a case to the supreme court, except such as is found in the act of March 3, 1891.<sup>3</sup> The language of that act is very general. All that is essential is that the case be pending in the circuit court of appeals, and of those classes of cases in which the decision of that court is declared a finality. When these two elements exist, the supreme court may reach out with its writ of *certiorari* and transfer the case there for review and determination.<sup>4</sup>

A decision of a circuit court of appeals on petition for revision may be reviewed on writ of certiorari, but not by

<sup>&</sup>lt;sup>1</sup> B. A. 1898, Sec. 25d.

<sup>226</sup> Stat. at L. 826, Sec. 6, which is re-enacted as Sec. 240 of the Judicial Code, act of March 3, 1911, 36 Stat. at L. 1087; Denver National Bank v. Klug, 186 U. S. 202, 46 L. Ed. 1127.

<sup>&</sup>lt;sup>8</sup> 26 Stat. at L. 826, re-enacted as Sec. 240 of the Judicial Code, act of March 3, 1911, 36 Stat. at L. 1087; Amer. Const. Co. v. Jacksonville Ry. Co., 148 U. S. 380, 37 L. Ed. 486.

<sup>&</sup>lt;sup>4</sup> Forsyth v. Hammond, 166 U. S. 513, 41 L. Ed. 1095.

<sup>Louisville Trust Co. v. Comingor, 181 U. S. 620, 45 L. Ed. 1031, 184 U. S. 18, 46 L. Ed. 413, 7 Am. B. R. 421; Bryan v. Bernheimer, 175 U. S. 724, 44 L. Ed. 338, 181 U. S. 188, 45 L. Ed. 814, 5 Am. B. R. 523; Mueller v. Nugent, 180 U. S. 640, 45 L. Ed. 711, 184 U. S. 1, 46 L. Ed. 405, 7 Am. B. R. 224.</sup> 

appeal or writ of error.<sup>5\*</sup> The decision of a court of appeals on appeal has been reviewed by the supreme court on writ of *certiorari* where it was a case in bankruptcy reviewable in the court of appeals only by petition to review.<sup>6</sup>

A writ of *certiorari* is the proper method of reviewing the decision of a circuit court of appeals on an appeal from a judgment adjudging or refusing to adjudge the defendant a bankrupt, or granting or denying a discharge, or confirming or refusing to confirm a composition, or allowing or rejecting a claim for less than \$2,000. The reason is that no appeal as of right may be taken to the supreme court.

A writ of error and not *certiorari* is the proper method of reviewing a judgment of a circuit court of appeals in a case taken into that court on writ of error. The reason is that such a proceeding is a controversy arising in bankruptcy and not a bankruptcy proceeding proper. Such controversies involve the construction of the bankrupt act. The decision of the circuit court of appeals is not final but may be reviewed on writ of error.

# § 860. The application for writ of certiorari to remove a case to the supreme court.

The application for a writ of *certiorari* to remove a case from the circuit court of appeals to the supreme court must be made to the supreme court.

The time within which the application must be made is not prescribed by the statute. It should, however, be made within a reasonable time after the final decision of the circuit court of appeals. One year is probably a reasonable time.<sup>1</sup>

\*Holden v. Stratton, 191 U. S.
 \*H15, 48 L. Ed. 116, 10 Am. B. R.
 \*Duryea Power Co. v. Sternbergh, 218 U. S. 299.

<sup>6</sup> First Nat. Bank v. Title & Trust Co., 198 U. S. 280, 49 L. Ed. 1051, 14 Am. B. R. 102.

7 See Sec. 830, ante.

8 See Sec. 856, ante.

<sup>1</sup> In the Conqueror, 166 U. S. 114, 41 L. Ed. 937, the supreme court said: "While we think such application should be made with reasonable promptness, as it was made during the term and within a year after the original decree, we think it

The application is made by petition.<sup>2</sup> The style of the case in that court is A. B., petitioner, v. C. D., respondent. The petition is filed in the office of the clerk of the supreme court, together with a deposit of twenty-five dollars on account of costs and an entry of appearance for the petitioning party, signed by a member of the bar of the supreme court. The case is then docketed.

The petitioner must also file a certified copy of the entire record, including all the proceedings in the circuit court of appeals.<sup>3</sup> A sufficient number of the printed copies of this record (not less than ten) must also be furnished to supply the court. These printed copies may usually be obtained from the clerk of the circuit court of appeals. In case they can not be so obtained the record must be reprinted under the supervision of the clerk of the supreme court. In such cases it is usually desirable to print at least fifty copies, in order that there may be a sufficient number for use on the final hearing, should the petition be granted.

Some Monday should be fixed for the submission of the petition, that being motion day. Sufficient notice must be given counsel for the respondent of the day selected to enable them to file briefs in opposition, if they desire to do so. Proof of service of such notice must be filed in the clerk's office. The petition must be called up and submitted in open court by counsel. The application is submitted on briefs. Oral arguments are not permitted.

was within the time. We do not think the party complaining is limited to the six months allowed by section 11 of the court of appeals act for suing out a writ of error from the court of appeals to review the judgment of the circuit or district court; and it would seem that he is, by analogy, entitled to the year within which section 6, an appeal shall be taken or writ of error sued out from this court to

review judgments or decrees of the court of appeals in cases where the losing party is entitled to such review."

See also Ayres v. Polsdorfer, 187 U. S. 585, 595, 47 L. Ed. 314; Spencer v. Duplan Silk Co., 191 U. S. 526, 532, 48 L. Ed. 287; Whitney v. Dick, 202 U. S. 132, 50 L. Ed. 963. <sup>2</sup> Loveland's Forms Fed. Prac. Forms Nos. 1438 to 1446.

<sup>3</sup> Supreme Court, Rule 37.

### § 861. Granting or refusing a writ of certiorari.

An order granting or refusing to grant a writ of certiorari to review the decision of a circuit court of appeals rests solely in the discretion of the supreme court.

The power of the supreme court to grant a writ of certiorari is restricted by law in two respects only, namely: first, the case must be pending in the circuit court of appeals at the time the application for the writ is made, and, second, it must be a case in which the decision of the circuit court of appeals is made final by statute. When these two elements exist the supreme court may reach out with its writ of certiorari and transfer the case there for review and determination. This may be done in law, equity, admiralty, criminal and bankruptcy cases, or any other case in which the decision of the circuit court of appeals is final, irrespective of the character of the suit.

This broad and comprehensive power has been sparingly exercised. At first the supreme court stated its reasons for granting or refusing to grant a writ of *certiorari* in a written opinion in each case. It declared that writs of *certiorari* will be allowed "only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding a conflict between two or more courts of appeal, or between courts of appeal and courts of a state,

<sup>1</sup> Forsyth v. Hammond, 166 U. S. 506, 41 L. Ed. 1095; American Const. Co. v. Jacksonville Ry. Co., 148 U. S. 372, 37 L. Ed. 486.

<sup>2</sup> Security Trust Co. v. Dent, 187
 U. S. 237, 47 L. Ed. 158; Cochran
 v. Montgomery County, 199 U. S.
 260, 50 L. Ed. 182.

<sup>3</sup> Forsyth v. Hammond, 166 U. S. 506, 41 L. Ed. 1095; American Const. Co. v. Jacksonville Ry. Co., 148 U. S. 372, 37 L. Ed. 486.

\* Union Steamboat Co. v. Erie & Western Transp. Co., 181 U. S. 621,
45 L. Ed. 1032, s. c. 189 U. S. 363.
47 L. Ed. 854; Hendry v. Ocean

Steamship Co., 164 U. S. 707 (memo. dec.); the Three Friends, 166 U. S. 1, 41 L. Ed. 897.

<sup>5</sup> Chetwood's Case, 165 U. S. 443, 462, 41 L. Ed. 782.

<sup>6</sup> Mueller v. Nugent, 184 U. S. 1, 46 L. Ed. 405, 7 Am. B. R. 224; Louisville Trust Co. v. Comingor, 184 U. S. 18, 46 L. Ed. 413, 7 Am. B. R. 421; Holden v. Stratton, 191, U. S. 115, 48 L. Ed. 116, 10 Am. B. R. 786.

<sup>7</sup> Whitney v. Dick, 202 U. S. 132, 50 L. Ed. 963; Lau Ow Bew v. United States, 144 U. S. 47, 36 L. Ed. 340.

or some matter affecting the interests of this nation in its internal or external relations demands such exercise." A writ was granted to bring up a case in which one member of the circuit court of appeals sat in the trial court at the hearing of the same case or question in the trial court.

These rules were rigidly adhered to by the supreme court for several years. In the words of Mr. Justice Brewer, the supreme court "while not doubting its power has been chary of actions in respect to *certiorari*." The supreme court very soon extended these rules and granted writs of *certiorari* in cases not comprehended within the classes enumerated.

Of the many applications which have been made to the supreme court, comparatively few have been granted, yet that court appears to be much more liberal of late in granting such writs than formerly. It has been the practice of that court for many years to pass an order granting or denying the writ in each case without stating its reason for its action in a written opinion. There are now no general rules to guide counsel as to the character of cases in which the writ will be allowed. The only way of finding out whether a writ of *certiorari* will be granted in a particular case is to apply for it and await the decision of that court upon the application.

## § 862. At what stage of the case certiorari may be granted.

The supreme court may require by *certiorari* the circuit court of appeals to certify a case at any stage of the proceedings in the circuit court of appeals.<sup>1</sup>

<sup>8</sup> Mr. Justice Brewer in Forsyth v. Hammond, 166 U. S. 514, 41 L. Ed. 1095.

See also American Const. Co. v. Jacksonville Ry. Co., 148 U. S. 383, 37 L. Ed. 486; Lau Ow Bew v. United States, 144 U. S. 58, 36 L. Ed. 340; *In re* Woods, 143 U. S. 202, 36 L. Ed. 125; Lau Ow Bew, Petitioner, 141 U. S. 583, 35 L. Ed. 865; the Three Friends, 166 U. S. 1, 41 L. Ed. 897.

<sup>9</sup> American Const. Co. v. Jacksonville Ry. Co., 148 U. S. 372, 386, 37 L. Ed. 486.

10 Forsyth v. Hammond, 166 U. S.513, 41 L. Ed. 1095.

<sup>11</sup> These cases are collated at the end of the supreme court reports in an appendix to each volume.

<sup>1</sup> The Three Friends, 166 U. S. 1, 41 L. Ed. 897; Forsyth v. Hammond, 166 U. S. 506, 41 L. Ed. 1095; American Const. Co. v. Jacksonville

In practice a writ of *certiorari* is usually allowed after a circuit court of appeals has pronounced its final judgment.<sup>2</sup> It may be issued before a final decision of the circuit court of appeals.

The decision of the circuit court of appeals upon an interlocutory order in equity granting an injunction or appointing a receiver is not a final judgment.<sup>3</sup> The supreme court has denied a writ of *certiorari* to review the decision of that court in such cases,<sup>4</sup> and has granted it in other cases.<sup>5</sup> A writ has been allowed to review a decision of the circuit court of appeals reversing the court below and remanding the case for new trial.<sup>6</sup> This is unusual because the judgment of the circuit court of appeals in such cases is not a final judgment.

In one case the writ was issued before any action had been taken by the circuit court of appeals.<sup>7</sup>

The fact that the mandate of the circuit court of appeals has gone down to the court below is immaterial, so long as the transcript of the record is still in the circuit court of appeals.<sup>8</sup>

#### § 863. Cross writs of certiorari.

It is necessary for a respondent to apply for a writ of *certiorari* in order to obtain relief in the supreme court. This is called a cross writ of *certiorari*.

Ry. Co., 148 U. S. 372, 37 L. Ed. 486; the Conqueror, 166 U. S. 110, 41 L. Ed. 937.

<sup>2</sup> Smith v. Vulcan Iron Works, 165 U. S. 518, 41 L. Ed. 810; American Const. Co. v. Jacksonville Ry. Co., 148 U. S. 372, 37 L. Ed. 486; Chicago & N. W. R. Co. v. Osborne, 146 U. S. 354, 36 L. Ed. 1002.

<sup>3</sup> American Const. Co. v. Jackson-ville Ry. Co., 148 U. S. 372, 37 L. Ed. 486.

<sup>4</sup> American Const. Co. v. Jacksonville Ry. Co., 148 U. S. 372, 37 L. Ed. 486; Smith v. Vulcan Iron Works, 165 U. S. 518, 41 L. Ed. 810; In re Tampa Suburban Ry. Co., 168U. S. 583, 42 L. Ed. 589.

<sup>5</sup> Brill v. Peckham Motor, etc., Co., 183 U. S. 698, 46 L. Ed. 395, s. c. 189 U. S. 57, 47 L. Ed. 706; Mast, Foos & Co. v. Stover Mfg. Co., 171 U. S. 689, and 177 U. S. 485, 44 L. Ed. 856.

<sup>6</sup> Penman v. St. Paul Ins. Co., 216 U. S. 311.

<sup>7</sup> The Three Friends, 166 U. S. 1, 41 L. Ed. 897, as explained in Forsyth v. Hammond, 166 U. S. 513, 41 L. Ed. 1095.

8 The Conquerer, 166 U. S. 110,
41 L. Ed. 937.

The respondent is entitled to urge any ground in the supreme court to support the decree or judgment of the circuit court of appeals. If he feels aggrieved by any portion of the decision it is necessary for him to prosecute an independent writ of *certiorari* in the same manner and within the time allowed for prosecuting the original writ of *certiorari*.

If the respondent does not apply for *certiorari* the supreme court will confine its consideration of the case to the examination of the errors assigned by the petitioner.<sup>1</sup>

One record will be sufficient ordinarily for both writs. If a record has been filed with the petitioner's application for a writ of *certiorari*, it will answer the requirement of the rule and the respondent need not file another record with his application.

If cross writs of *certiorari* are prosecuted and neither party prevails in the supreme court each must pay his own costs.<sup>2</sup>

### § 864. Stay of proceedings pending writ of certiorari.

The circuit court of appeals will not stay a mandate for the purpose of allowing an application to be made for a writ of *certiorari*.

If it is desired to stay the proceedings in the circuit court of appeals, application should be made to the supreme court for writ of *certiorari* and for a stay of proceedings. That court may stay mandate of the circuit court of appeals pending the disposition of the application, if the application is made before the mandate is issued.

The effect of granting a writ of *certiorari* is to suspend any action that might be taken by the circuit court of appeals or by the trial court in obedience to its mandate after the *certiorari* is granted.<sup>1</sup>

Hubbard v. Tod, 171 U. S. 474,
 L. Ed. 246; French Republic v. Saratoga Vichy Springs Co., 191
 U. S. 427, 48 L. Ed. 247.

<sup>&</sup>lt;sup>2</sup> La Bourgogne, 210 U. S. 95, 52 L. Ed. 973.

<sup>&</sup>lt;sup>1</sup> Boston & Maine R. Co. v. Gokey, 150 Fed. Rep. 686; Louisville, N. A. C. Ry. Co. v. Louisville Trust Co., 78 Fed. Rep. 659.

#### § 865. Proceedings on writ of certiorari.

When a writ of *certiorari* is granted it is issued by the clerk of the supreme court and sent to the clerk of the circuit court of appeals from which the case is to be removed.

A return to such writ is ordinarily made pursuant to a stipulation of counsel filed in the office of the clerk of the circuit court of appeals. The stipulation is in effect an agreement that the transcript of record filed with the application for the writ may be taken as a return to the writ and no new transcript made. The clerk returns the writ by endorsing thereon a copy of the stipulation. This writ is returned to the office of the clerk of the supreme court and the case is then pending in the supreme court, upon writ of certiorari. Unless a sufficient number of records were printed upon the application for the writ, the record must be printed under the supervision of the clerk of the supreme court as in a case taken there on appeal or writ of error.

A case removed to the supreme court on writ of *certiorari* is pending there as on appeal or writ of error at the instance of the petitioner. The statute expressly confers upon the supreme court the same authority and power to review and determine the case "as if it had been carried by appeal or writ of error to the supreme court." <sup>1</sup>

The court will try the case on the assignments of error of the petitioner. The respondent will not be heard to challenge the decision of the circuit court of appeals unless he applies for a cross writ of *certiorari*.<sup>2</sup> The burden is upon the petitioner and he will be allowed to open and close the argument, as in the case of an appeal or writ of error.

Whenever a case has been reviewed and determined by the supreme court on a writ of certiorari to a circuit court of

<sup>&</sup>lt;sup>1</sup> Section 6 of the Act of March 3, 1891, 26 Stat. at L. 826. Sec. 240 of the Judicial Code of 1911. Lutcher & Moore Lumber Co. y. Knight, 217 U. S. 257, 267.

<sup>Hubbard v. Tod, 171 U. S. 474,
L. Ed. 246; the French Republic
V. Saratoga Vichy Springs Co., 191
U. S. 427, 440, 48 L. Ed. 247; La
Bourgogne, 210 U. S. 95, 52 L. Ed. 973.</sup> 

appeals, the mandate issues directly to and the cause is remanded to the proper district court for further proceedings in pursuance of such determination.<sup>3</sup>

Where the circuit court of appeals reversed the decision of the trial court and the supreme court enters a judgment of affirmance by divided court, it has not been decided whether it affirm the decision of the circuit court of appeals from which the case was removed into that court or the decision of the trial court to which its mandate runs. In two cases at least the supreme court has granted a petition for rehearing under such circumstances.<sup>4</sup>

It sometimes occurs that a mandate of the supreme court, directed to a district court in a case removed by writ of certiorari from a circuit court of appeals, can only be construed on appeal to the circuit court of appeals, because no appeal will lie to the supreme court in the case.<sup>5</sup> The supreme court will usually grant a second writ of certiorari in that case so as to construe its own mandate. This does not follow as a matter of right.

<sup>8</sup> Act of March 3, 1891, 26 Stat. at L. 826, Sec. 10. In Lutcher & Moore Lumber Co. v. Knight, 217 U. S. 257, the mandate was issued to the circuit court of appeals with directions to hear and decide the case. See also First Nat'l Bank v. Title & Trust Co., 198 U. S. 280, 292, s. c. 207 U. S. 61.

<sup>4</sup> Adams v. Cowen, affirmed by divided court, 174 U. S. 800, 43 L. Ed. 1188, affirmed on rehearing, 177 U. S. 471, 44 L. Ed. 850. In Baltimore & Ohio S. W. R. R. Co. v. United States, 216 U. S. 617, and 220 U. S. 94, the motion was granted in March, 1910, and the case set for argument at the October session following.

Mason v. Pewabic Min. Co., 153
U. S. 361, 366, 38 L. Ed. 745; The
New York (C. C. A. 6th Cir.), 104
Fed. Rep. 561, 44 C. C. A. 38;

First Nat. Bank v. Chicago Title & Trust Co., 207 U. S. 61, 52 L. Ed. 103, 19 Am. B. R. 542, reversing (C. C. A. 7th Cir.), 146 Fed. Rep. 742, 77 C. C. A. 408, 16 Am. B. R. 848.

The case of The New York, 175 U. S. 187, 44 L. Ed. 146, was decided on certiorari and remanded to the district court. The owners of the New York, not satisfied with the decree on the mandate, applied to the supreme court for a writ of mandamus to compel the court below to enter a proper decree, Ex parte Union Steamboat Co., 178 U. S. 317, 44 L. Ed. 1084. That court held this remedy was by appeal and upon the intimation an appeal was taken to the circuit court of appeals. After a motion to dismiss had been denied, 104 Fed. 561, 44 C. C. A. 38, and decree affirmed 108 Fed.

#### § 866. Questions certified by circuit courts of appeals.

A circuit court of appeals may certify to the supreme court any question or proposition of law in any pending suit concerning which it desires the instruction of the supreme court for its proper decision.<sup>1</sup>

After conferring appellate jurisdiction upon the circuit court of appeals in all cases other than those which may be taken direct to the supreme court under the provisions of section 5 of the judiciary act of 1891,2 section 6 provides: "that in every such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the supreme court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision. And thereupon the supreme court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit courts of appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal."

The object of this provision is that where a real question of a difficult point of law, clearly presenting itself and arising

Rep. 102, 47 C. C. A. 232, a second writ of *certiorari* was granted and the decree of the circuit court of appeals was affirmed by the supreme court, 189 U. S. 363, 47 L. Ed. 854.

<sup>1</sup> B. A. 1898, Sec. 24d, Sec. 239 of the Judicial Code, act of March 3, 1911, 36 Stat. at L. 1087, re-enacting in part Sec. 6 of the act of March 3, 1891, 26 Stat. at L. 826.

As was done in Wood & Henderson, 210 U. S. 246, 42 L. Ed. 1046, 20 Am. B. R. 1; Toxaway Hotel Co. v. Smathers, 216 U. S. 439, 54 L. Ed. 558, 23 Am. B. R. 626; Elliott v. Toeppner, 187 U. S. 327, 47 L.

Ed. 200, 9 Am. B. R. 50; Elkus, Petitioner, 216 U. S. 115, 54 L. Ed. 407, 23 Am. B. R. 614; Hicks v. Knost, 178 U. S. 541, 44 L. Ed. 1183, 4 Am. B. R. 178; Wall v. Cox, Schloeb, 178 U. S. 542, 44 L. Ed. 1183, 4 Am. B. R. 178; Wall v. Cox, 181 U. S. 244, 45 L. Ed. 485, 5 Am. B. R. 727; Wilson v. Nelson, 183 U. S. 191, 46 L. Ed 147, 7 Am. B. R. 142: Metcalf v. Barker, 187 U. S. 165, 47 L. Ed. 122, 9 Am. B. R. 36; Randolph v. Scruggs, 190 U. S. 533, 47 L, Ed. 1165, 10 Am. B. R. 1. <sup>2</sup> Act of March 3, 1891, 26 Stat. at L. 826.

in the progress of the case, is such that the judges of the circuit court of appeals sitting on the hearing are of the opinion that they desire the instruction of the supreme court in regard to that question, they are at liberty to certify it to that court for an answer. The power granted is very comprehensive. It authorizes the circuit court of appeals "in every such subject within its appellate jurisdiction" and "at any time" to certify to the supreme court "any question or proposition of law" concerning which it desires the instruction of that court.

The only restriction to the exercise of this power is that the question shall be one of law as distinguished from fact or of mixed law and facts.<sup>3</sup> Certifying questions the answer to which involves the weighing of evidence or the determination of matters of fact does not confer jurisdiction on the supreme court to answer them.<sup>4</sup>

### § 867. The certificate of questions discretionary.

The questions of law to be certified rest wholly in the discretion of the circuit court of appeals.<sup>1</sup>

This discretion must be exercised by a court competent to hear the case. At least a quorum of the members of the court must sit in the particular case in which the question is certified.<sup>2</sup>

<sup>3</sup> Chicago B. & C. Ry. Co. v. Williams, 205 U. S. 444, 51 L. Ed. 875, 214 U. S. 942; Warner v. New Orleans, 167 U. S. 467, 42 L. Ed. 239; Cross v. Evans, 167 U. S. 60, 42 L. Ed. 77; Del Monte Min. Co. v. Last Chance Min. Co., 171 U. S. 55, 91, 43 L. Ed. 72; Felsenheld v. United States, 186 U. S. 126, 134, 46 L. Ed. 1085.

<sup>4</sup> McHenry v. Alford, 168 U. S. 651, 42 L. Ed. 614; Cross v. Evans, 167 U. S. 60, 42 L. Ed. 77; Graver v. Faurot, 162 U. S. 435, 40 L. Ed. 1030.

<sup>1</sup> Louisville, etc., Ry. Co. v. Pope (C. C. A. 7th Cir.), 74 Fed. Rep. 1, 20 C. C. A. 253; Andrews v. National Foundry & Pipe Wks. (C. C. A. 7th Cir.), 77 Fed. Rep. 774, 23 C. C. A. 454; Pullman Palace Car Co. v. Central Transp. Co. (C. C. A. 3d Cir.), 83 Fed. Rep. 1, 27 C. C. A. 389; Fabre v. Cunard Steamship Co. (C. C. A. 2d Cir.), 59 Fed. Rep. 500, 8 C. C. A. 199.

But see Farmers & M. State Bank v. Armstrong, 49 Fed. Rep. 600.

<sup>2</sup> Cincinnati, H. & D. Ry. Co. v. McKeen, 149 U. S. 259, 37 L. Ed.

It is not a discretion the exercise of which may be invoked by a party as a matter of right. It is not proper for counsel to file a motion for a certificate. If such motion is made the court will usually deny it.<sup>3</sup> It is for the circuit court of appeals alone to determine whether it desires the instruction of the supreme court.

Unless the court is in doubt with reference to the proper decision of some question of law, the answer to which is to aid the court in determining the case, the court should not certify the question.<sup>4</sup> If it does the supreme court will not entertain the certificate.<sup>5</sup>

The circuit court of appeals will not ordinarily certify a question in advance of the argument, nor after it has decided the case. The circuit court of appeals may certify certain questions in a case and file an opinion on other points in the same case. In such cases the final decree or judgment will

725; United States v. Emholt, 105 U. S. 414, 26 L. Ed. 1077.

8 Louisville, etc., Ry. Co. v. Pope (C. C. A. 7th Cir.), 74 Fed. Rep. 1, 20 C. C. A. 253; Andrews v. National Foundry & Pipe Wks. (C. C. A. 7th Cir.), 77 Fed. Rep. 774, 23 C. C. A. 454; Pullman Palace Car Co. v. Central Transp. Co. (C. C. A. 3d Cir.), 83 Fed. Rep. 1, 27 C. C. A. 389; Fabre v. Cunard Steamship Co. (C. C. A. 2d Cir.), 59 Fed. Rep. 500, 8 C. C. A. 199.

<sup>4</sup> Fabre v. Cunard Steamship Co. (C. C. A. 2d Cir.), 59 Fed. Rep. 500, 8 C. C. A. 199; the Horace B. Parker (C. C. A. 1st Cir.), 74 Fed. Rep. 640, 20 C. C. A. 572; Alabama Great Southern Ry. Co. v. Thompson, 200 U. S. 206, 50 L. Ed. 441; Columbus Watch Co. v. Robbins, 148 U. S. 266, 37 L. Ed. 445.

<sup>5</sup> Columbus Watch Co. v. Robbins, 148 U. S. 266, 37 L. Ed. 445; Alabama Southern Ry. Co. v. Thompson, 200 U. S. 206, 213, 50 L. Ed. 441.

<sup>6</sup> Louisville, etc., Ry. Co. v. Pope (C. C. A. 7th Cir.), 74 Fed. Rep. 1, 20 C. C. A. 253.

<sup>7</sup> The Majestic (C. C. A. 2d Cir.), 69 Fed. Rep. 844, 13 C. C. A. 676; Columbus Watch Co. v. Robbins, 148 U. S. 266, 37 L. Ed. 445; Cella v. Brown (C. C. A. 8th Cir.), 144 Fed. Rep. 742, 765, 75 C. C. A. 608; Andrews v. National F. & P. Works (C. C. A. 7th Cir.), 77 Fed. Rep. 774, 23 C. C. A. 454; the Horace B. Parker (C. C. A. 1st Cir.), 74 Fed. Rep. 640, 20 C. C. A. 572.

8 Sigafus v. Porter (C. C. A. 2d Cir.), 84 Fed. Rep. 430, 28 C. C. A. 443; McCormick Harvesting Mach. Co. v. Aultman (C. C. A. 6th Cir.), 69 Fed. Rep. 371, 16 C. C. A. 259; Compton v. Jesup (C. C. A. 6th Cir.), 68 Fed. Rep. 263, 15 C. C. A. 397, and on certificate, 167 U. S. 1, 42 L. Ed. 55.

await the decision of the supreme court. The circuit court of appeals may withhold any opinion on the points not certified until after the decision of the supreme court on the points certified. This is the usual practice.

### § 868. Distinct questions of law alone may be certified.

It is only "questions or propositions of law" which are authorized to be certified by a circuit court of appeals to the supreme court.<sup>1</sup>

Such questions must be distinct questions or propositions of law unmixed with questions of fact or of mixed fact and law.<sup>2</sup> It is not always easy to draw the line, for, in order to present a distinct question of law, it may sometimes be necessary to present many facts upon which the question is based. While a statement of facts must accompany the certificate as to show that the question of law is applicable to the case,<sup>3</sup> the point on which the advice of the supreme court is sought must be a distinct question of law clearly stated, so that it can be answered without reference to the pleadings or evidence or other issues of law in the case.<sup>4</sup>

If more than one question is certified in a particular case, each question must contain a single proposition of law, and if any question contains more than a single question or proposition of law, it will not be answered.<sup>5</sup>

<sup>1</sup> Sec. 239 of the Judicial Code, Act of March 3, 1911, 36 Stat. at L. 1087, re-enacted in part Sec. 6 of the Act of March 3, 1891, 26 Stat. at L. 826.

<sup>2</sup> Warner v. New Orleans, 167 U. S. 467, 475, 42 L. Ed. 239; McHenry v. Alford, 168 U. S. 651, 42 L. Ed. 614; Graver v. Faurot, 162 U. S. 435, 40 L. Ed. 1030; Chicago, B. & Q. Ry. Co. v. Williams, 205 U. S. 444, 51 L. Ed. 875, 214 U. S. 492; Hallowell v. United States, 209 U. S. 101, 52 L. Ed. 702; United States v. Union Pac. R. Co., 168 U. S. 505, 42 L. Ed. 559.

<sup>3</sup> Supreme Court, Rule 37. Cincinnati, H. & D. Ry. Co. v. McKeen. 149 U. S. 259, 37 L. Ed. 725; Emsheimer v. New Orleans, 186 U. S. 33, 46 L. Ed. 1042.

<sup>4</sup> McHenry v. Alford, 168 U. S. 651, 42 L. Ed. 614; Warner v. New Orleans, 167 U. S. 467, 42 L. Ed. 240; Hallowell v. United States, 209 U. S. 101, 52 L. Ed. 702; Felsenheld v. United States, 186 U. S. 126, 134, 46 L. Ed. 1085; Graver v. Faurot, 162 U. S. 435, 40 L. Ed. 1030.

<sup>5</sup> Quinlan v. Green County, 205 U. S. 410, 418, 51 L. Ed. 860.

When other separate and distinct propositions of law not expressly referred to in the certificate are essential to be passed upon in considering the general question certified, it will not be answered.<sup>6</sup>

The question certified must be one the answer to which is to aid the court in determining a case before it. It is immaterial whether the question was raised by counsel or not. It is sufficient if it is deemed necessary by the circuit court of appeals. Where the question certified presents an abstract proposition or hypothetical question, and no facts in the certificate show that it has arisen or can arise in the case, the supreme court will decline to answer it.

## § 869. General questions involving the entire case can not be certified.

The supreme court has no jurisdiction of a question certified by a circuit court of appeals which embraces the whole case, even if its decision turns upon matters of law only.<sup>1</sup>

The statute does not contemplate that the whole case shall be removed into the supreme court on a certificate of questions by a circuit court of appeals. The case remains in the circuit court of appeals pending the certificate. The distinct

<sup>6</sup> Cross v. Evans, 167 U. S. 60, 42
L. Ed. 77; United States v. Union
P. R. Co., 168 U. S. 505, 42 L. Ed.
559.

<sup>7</sup> Columbus Watch Co. v. Robbins, 148 U. S. 266, 37 L. Ed. 445; Alabama Great Southern Ry. Co. v. Thompson, 200 U. S. 206, 50 L. Ed. 441.

8 Havemeyer v. Iowa County, 3
Wall. 294, 18 L. Ed. 38; United States v. Cook, 154 U. S. 555, 18 L. Ed. 835; Ogilvie v. Knox Ins. Co., 18 How. 577, 15 L. Ed. 490; Pelham v. Rose, 9 Wall. 103, 19 L. Ed. 602.

<sup>1</sup> Cross v. Evans, 167 U. S. 60, 42 L. Ed. 77; Graver v. Faurot, 162 U.

S. 435, 40 L. Ed. 1030; Felsenheld v. United States, 186 U.S. 134, 46 L. Ed. 1085; Hallowell v. United States, 209 U. S. 101, 52 L. Ed. 702; Chicago, B. & Q. R. Co. v. Williams, 205 U. S. 444, 51 L. Ed. 875, 214 U. S. 492; Warner v. New Orleans, 167 U. S. 474, 42 L. Ed. 241; United States v. Union Pac. R. Co., 168 U. S. 512, 42 L. Ed. 561; McHenry v. Alford, 168 U. S. 658, 42 L. Ed. 617; Del Monte Min. Co. v. Last Chance Min. Co., 171 U. S. 55, 43 L. Ed. 87; Sioux City O'N. & W. R. Co. v. Manhattan Trust Co., 172 U. S. 642, 43 L. Ed. 1180.

propositions of law certified is the only part of the case removed to the supreme court. The record should not be transmitted or the supreme court required to search through the entire record to determine the questions of law certified. If the question certified is so general as to involve a consideration of the entire record the supreme court will decline to answer it.<sup>2</sup> The supreme court may require the record to be sent up by writ of *certiorari*, and decide the whole case, if it sees fit to do so.<sup>3</sup>

#### § 870. Certificate must contain a statement of facts.

Rule 37 of the supreme court provides: "Where, under section 6 of the said act, a circuit court of appeals shall certify to this court a question or proposition of law, concerning which it desires the instruction of this court for its proper decision, the certificates shall contain a proper statement of the facts on which such question or proposition of law arises."

The statement of facts contemplated by this rule is a succinct statement or finding of all the facts necessary to show the application of the questions of law certified to the case pending in the circuit court of appeals. It should be a statement of ultimate facts, leaving nothing but the conclusions of law to be drawn from them. A transcript of the record is not such a statement.

Where the certificate of questions by a circuit court of appeals contains no such statement, or the entire record is certified, the supreme court will not regard the certificate as in

<sup>&</sup>lt;sup>2</sup> Cross v. Evans, 167 U. S. 60, 42 L. Ed. 77; Felsenheld v. United States, 186 U. S. 126, 134, 46 L. Ed. 1085; Hallowell v. United States, 209 U. S. 101, 52 L. Ed. 702; Emsheimer v. New Orleans, 186 U. S. 33, 46 L. Ed. 1042.

<sup>&</sup>lt;sup>3</sup> See *Certiorari* and Certificate in the Same Case, Sec. 873, post.

<sup>&</sup>lt;sup>1</sup> Jewell v. Knight, 123 U. S. 426, 31 L. Ed. 190; McHenry v. Alford, 168 U. S. 651, 42 L. Ed. 614.

<sup>&</sup>lt;sup>2</sup> Cincinnati, H. & D. Ry. Co. v. McKeen, 149 U. S. 259, 37 L. Ed. 725.

compliance with this rule. It will decline to answer the questions certified and dismiss the certificate.<sup>3</sup>

### § 871. The form of the certificate.

The certificate of questions from a circuit court of appeals to the supreme court should be entitled in the circuit court of appeals.<sup>1</sup>

It should show that the instructions of the supreme court are desired in the particular case upon a particular question, the answer to which will aid the court in determining the case.<sup>2</sup> This may be shown in the certificate in these words: "There arises in this case a question of law upon which this court desires the instruction of the supreme court for its proper decision. It is therefore ordered that the statement and questions here following be, and hereby are, certified to the supreme court, as provided by section 6 of the act of March 3, 1891."

The certificate should contain a statement of the facts on which the proposition of law arises, as may be necessary to the determination of the question certified.<sup>3</sup> It should not contain the whole record. The statement of facts should be all ultimate facts, leaving nothing but conclusions of law to be drawn from it.<sup>4</sup>

The certificate regularly concludes with the questions concerning which the advice of the supreme court is sought. The question propounded should contain a single proposition of law.<sup>5</sup> Several different questions may be included in the

<sup>8</sup> Cincinnati, H. & D. Ry. Co. v.
McKeen, 149 U. S. 259, 37 L. Ed.
725; Emsheimer v. New Orleans,
186 U. S. 33, 46 L. Ed. 1042.

<sup>1</sup> For forms of certificate of questions, see Loveland's Forms of Fed. Prac. No. 1435, et seq.

<sup>2</sup> Columbus Watch Co. v. Robbins, 148 U. S. 266, 37 L. Ed. 445; Alabama Southern Ry Co. v. Thompson, 200 U. S. 206, 50 L. Ed. 441.

<sup>3</sup> Supreme Court, Rule 37. Cincinnati, H. & D. Ry. Co. v. McKeen, 149 U. S. 259, 46 L. Ed. 725; Emsheimer v. New Orleans, 186 U. S. 33, 46 L. Ed. 1042.

<sup>4</sup> Jewell v. Knight, 123 U. S. 426, 31 L. Ed. 191; McHenry v. Alford, 168 U. S. 651, 42 L. Ed. 614.

<sup>5</sup> Quinlan v. Green County, 205 U. S. 410, 418, 51 L. Ed. 860. certificate. If more than one question is certified in a particular case, each question must contain a single proposition of law, and if any question contains more than a single proposition of law, that question will not be answered, although the other questions certified in the same case may be answered.<sup>6</sup>

The certificate should be signed by the judges constituting the circuit court of appeals sitting in the particular case. The certificate is irregular when a quorum of the members of the circuit court of appeals does not sit in the case.<sup>7</sup>

The clerk of the circuit court of appeals should attach to this certificate a certificate to the effect that the certificate of the court was duly filed and entered of record in the clerk's office by order of the court, and, as directed by the court, the certificate is forwarded to the supreme court for its action thereon.<sup>8</sup>

### § 872. Proceedings on a certificate in the supreme court.

The certificate, including the statement of facts, the questions of law and the certificate of the clerk, is transmitted to the clerk of the supreme court.

These papers constitute the record in a case in the supreme court. The certificate is docketed and the record printed by the clerk of that court, as in any other case.

The case is set for argument upon the certificate, like a case upon an appeal or writ of error. Counsel are permitted to file briefs and make oral argument.

After the jurisdiction of the supreme court has attached by reason of the filing of the certificate in the clerk's office, that court may proceed to decide the question certified, although the circuit court of appeals subsequently vacates the order certifying the question.<sup>1</sup>

- <sup>6</sup> Quinlan v. Green County, 205 U.
   S. 410, 418, 51 L. Ed. 860.
- <sup>7</sup> Cincinnati, H. & D. Ry. Co. v. McKeen, 149 U. S. 259, 37 L. Ed. 725; United States v. Emholt, 105 U. S. 414, 26 L. Ed. 1077.
- 8 For form of certificate of clerk, see Loveland's Forms of Fed. Prac. No. 1435.
- <sup>1</sup> In Good Shot v. United States, 179 U. S. 87, 45 L. Ed. 101, the certificate was duly transmitted to the

When a certificate is brought into the supreme court, only the questions certified are brought before that court.<sup>2</sup> The cause remains in the circuit court of appeals, unless a writ of certiorari is ordered by the supreme court to bring up the whole case. In deciding questions certified, the supreme court will decline to decide any other question, although it may involve the jurisdiction of the trial court.<sup>3</sup>

The supreme court will not answer a moot question which can be of no aid to the circuit court of appeals in determining the case.<sup>4</sup> It will not decide an unnecessary question. Where the answer to one question makes the answer to others unnecessary, it will decline to answer such questions.<sup>5</sup>

When a question certified is such as the court is not authorized to answer it will decline to answer it. As where the certificate is irregular, or where the question contains more

clerk of the supreme court, but was not filed until October 15, 1900. On October 17 Good Shot filed a petition praying that a certiorari might be issued requiring the entire record and cause be sent up from the circuit court of appeals. On the same day there was filed a certified transcript of an order of the circuit court of appeals, entered October 15, purporting to vacate and annul the order certifying the case, and to recall the The supreme court, certificate. however, answered the question and denied the certiorari.

<sup>2</sup> United States v. Thomas, 151 U. S. 577, 38 L. Ed. 276; Ogle v. Lee, 2 Cranch, 33, 2 L. Ed. 198; Willinks v. Hollingsworth, 6 Wheat. 240, 5 L. Ed. 251; Kennedy v. Bank of Georgia, 8 How. 586, 12 L. Ed. 1209.

In United States v. Union Pacific Ry. Co., 168 U. S. 505, 513, 42 L. Ed. 559, the court said: "To answer the questions certified would require us to consider the several

matters thus pressed on our attention; to pass upon questions of law not specifically propounded; and to dispose of the whole case. It follows that the certificate is insufficient under the statute."

<sup>8</sup> In McHenry v. Alford, 168 U. S. 651, 659, 42 L. Ed. 614, the supreme court said: "If the whole case were here upon writ of error or appeal we should have to look into any question of jurisdiction, whether raised or not, but we are not obliged to do so when questions only are certified to us, unless presented in proper form."

<sup>4</sup> United States v. Tynen, 11 Wall. 88, 20 L. Ed. 153; United States v. Buzzo, 18 Wall. 125, 21 L. Ed. 812; Columbus Watch Co. v. Robbins, 148 U. S. 266, 37 L. Ed. 445.

United States v. Britton, 108 U.
S. 199, 27 L. Ed. 698; United States v. Reese, 92 U. S. 214, 23 L. Ed. 563.
Cincinnati, H. & D. Ry. Co. v. McKeen, 149 U. S. 259, 37 L. Ed. 725.

than a single proposition of law,<sup>7</sup> or where the certificate contains no statement of fact, or the whole record is brought up,<sup>8</sup> or where the particular points upon which the advice of the supreme court is sought are not distinctly stated.<sup>9</sup>

Where the supreme court is divided in opinion it will remand the case to the circuit court of appeals without answer.<sup>10</sup>

# § 873. Certiorari and certificate in the same case.

When the circuit court of appeals has certified a question of law to the supreme court, that court may do one of two things.

The statute provides that, first, "the supreme court may either give its instructions on the questions and propositions certified to it, which shall be binding upon the circuit court of appeals, in such case," or second, "it may require that the whole record and cause may be sent up to it for its consideration, and thereupon decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal." <sup>1</sup>

A certificate of questions of law by a circuit court of appeals brings into the supreme court only the questions certified. The case remains in the circuit court of appeals unless a writ of *certiorari* is issued by the supreme court to bring up the whole case. Under this provision the supreme court may,

<sup>7</sup> Quinlan v. Green County, 205 U. S. 410, 51 L. Ed. 860.

Cross v. Evans, 167 U. S. 60,
L. Ed. 77; Cincinnati, H. & D.
Ry. Co. v McKeen, 149 U. S. 259,
L. Ed. 725.

Chicago, B. & Q. Ry. Co. v. Williams, 205 U. S. 444, 51 L. Ed. 875;
Felsenheld v. United States, 186 U. S. 126, 134, 46 L. Ed. 1085;
Hallowell v. United States, 209 U. S. 101, 52 L. Ed. 702;
Warner v. New

Orleans, 167 U. S. 467, 478, 42 L. Ed. 240.

Richey v. Williams, 20 L. Ed.
 Hannauer v. Woodruff, 10
 Wall. 482, 19 L. Ed. 991; New York v. Miller, 8 Pet. 120, 8 L.
 Ed. 888; Silliman v. Hudson River Bridge Co., 1 Black, 582, 17 L. Ed. 81.

<sup>1</sup> Sec. 239 of the Judicial Code, Act of March 3, 1911, 36 Stat. at L. 1087, re-enacting in part Sec. 6 of the Act of March 3, 1891, 26 Stat. at L. 826. on its own motion, order a writ of *certiorari* to issue to the circuit court of appeals to bring up the entire record. Either party may apply to the supreme court for a writ of *certiorari* in such case.<sup>2</sup>

Supreme court rule 37, after providing for certifying questions, declares: "If application is thereupon made to this court that the whole record and cause may be sent up to it for its consideration, the party making such application shall, as a part thereof, furnish this court with a certified copy of the whole of such record." The application by a party, and the proceedings in connection with the writ of *certiorari* in such cases, is the same as in a case in which the decision of the circuit court of appeals is made final.<sup>3</sup>

If the supreme court grants the writ of certiorari the cause is removed from the circuit court of appeals, and is no longer pending in that court. The supreme court reviews and determines the whole case with the same power and authority as if it had been carried up by appeal or writ of error to the supreme court. Its mandate will issue to the circuit or district court having original jurisdiction.<sup>4</sup> If the writ of certiorari is denied, and the decision of the supreme court rendered upon the certificate, the mandate will issue to the circuit court of appeals certifying the question.

## § 874. Proceedings in the circuit court of appeals on mandate.

When the supreme court has decided upon an answer to the question certified, the answer is certified under the hand and seal of the clerk of the supreme court to the circuit court of appeals. The statute provides that the instruction of the supreme court to questions certified to it shall be binding upon the circuit court of appeals.<sup>1</sup>

<sup>&</sup>lt;sup>2</sup> Good Shot v. United States, 179 U. S. 87, 45 L. Ed. 101.

<sup>&</sup>lt;sup>3</sup> See application for writ of *certiorari* to remove a case to the supreme court, Sec. 860, *ante*.

<sup>&</sup>lt;sup>4</sup> Sec. 10 of the Act of March 3, 1891, 26 Stat. at L. 826.

<sup>&</sup>lt;sup>1</sup> Sec. 239 of the Judicial Code, Act of March 3, 1911, 36 Stat. at L. 1087, re-enacting in part Sec. 6 of the Act of March 3, 1891, 26 Stat. at L. 826.

In case the circuit court of appeals has decided all the other questions at issue in the case pending before it, a judgment or decree may usually be entered upon the certificate from the supreme court without further argument.

In case the circuit court of appeals desires further argument, it may direct the whole case reargued in view of the certificate of the supreme court.

In all cases the final judgment or decree is entered in the circuit court of appeals from which the question was certified. The mandate then issues from the circuit court of appeals as in other cases.

### § 875. Costs on certificate.

The plaintiff in error or the appellant in the circuit court of appeals is required to advance costs in the supreme court upon certificate of questions of law.

The supreme court rarely makes any direction with reference to costs in case of a certificate. If no direction is made the circuit court of appeals may tax costs incurred on the certificate in the supreme court, upon a showing being made as to the amount of costs in that court.

## § 876. Review of a final decision after question certified.

If a question of law is certified to the supreme court, and there decided, its decision is binding on the circuit court of appeals.<sup>1</sup>

The determination of the question certified does not affect the right to bring up the whole case by writ of error, or appeal, or *certiorari*, after a final judgment or decree in the circuit court of appeals.<sup>2</sup>

<sup>1</sup> Sec. 239 of the Judicial Code, Act of March 3, 1911, 36 Stat. at L. 1087, re-enacting in part Sec. 6 of the Act of March 3, 1891, 26 Stat. at L. 826.

<sup>2</sup> Ogle v. Lee, 2 Cranch, 33, 2 L. Ed. 198.

In Quinlan v. Green County, questions were certified and an-

swered (205 U. S. 410, 51 L. Ed. 860). After a final decision in the circuit court of appeals a writ of *ccrtiorari* was granted to bring up the whole case (209 U. S. 550), and the decision of the circuit court of appeals was affirmed (211 U. S. 582, 53 L. Ed. 335).

# § 877. Appeals and writs of error direct from the district court.

An appeal or writ of error may be taken from a district court direct to the supreme court in certain enumerated cases.<sup>1</sup>

This jurisdiction has been invoked in bankruptcy cases where the Constitution or a treaty of the United States was involved in the trial court; <sup>2</sup> and in cases involving the jurisdiction of the trial court.<sup>8</sup>

Section 228 of the code provides for an appeal or writ of error from a district court direct to the supreme court "in any case in which the jurisdiction of the court is in issue; in which case the question of jurisdiction alone shall be certified to the supreme court from a court below for decision."

The word "jurisdiction" as used in this clause relates only to cases where the question is as to the jurisdiction of courts of the United States as such.<sup>4</sup> It must be a question of fed-

<sup>1</sup> Sec. 238 of the Judicial Code, Act of March 3, 1911, 36 Stat. at L. 1087, re-enacting Sec. 5 of the Act of March 3, 1891, 26 Stat. at L. 826, provides as follows: "Appeals and writs of error may be taken from the district courts, including the United States district court for Hawaii, direct to the supreme court in the following cases: In any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified to the supreme court from the court below for decision; from the final sentences and decrees in prize causes; in any case that involves the construction or application of the constitution of the United States; in any case in which the constitutionality of any law of the United States, or the validity or

construction of any treaty made under its authority is drawn in question; and in any case in which the constitution or law of a State is claimed to be in contravention of the constitution of the United States."

Hanover Nat. Bank v. Moyses,
 186 U. S. 181, 46 L. Ed. 1113, 8
 Am. B. R. 1.

Babbitt v. Dutcher, 216 U. S.
102, 54 L. Ed. 402, 23 Am. B. R.
519; Harris v. First Nat. Bank,
216 U. S. 382, 54 L. Ed. 528, 23
Am. B. R. 632; Hudson Oil & Supply Co. v. Booraem, 216 U. S.
604, 54° L. Ed. 636; Grant Shoe
Co. v. Laird, 212 U. S. 445, 53
L. Ed. 591, 21 Am. B. R. 484.

\*Denver First Nat. Bank v. Klug, 186 U. S. 202, 46 L. Ed. 1127, 8 Am. B. R. 12; Schweer v. Brown, 195 U. S. 171, 49 L. Ed.

eral jurisdiction of the court of bankruptcy and not a question of whether that court has jurisdiction in bankruptcy to make the order complained of.<sup>5</sup> Such orders are reviewable in a circuit court of appeals on petition to review.<sup>6</sup>

A question of federal jurisdiction is presented where the power of the court of bankruptcy is challenged to make an adjudication on the ground that the claim of the petitioning creditor is for unliquidated damages and therefore not provable in bankruptcy; <sup>7</sup> or to exercise ancillary jurisdiction in aid of the court of original jurisdiction—sitting in another district; <sup>8</sup> or to entertain a suit by the trustee to recover property for the estate; <sup>9</sup> or sitting in admiralty had the power to allow expenses and claims of a receiver in bankruptcy to be first paid from the proceeds of the vessel which was in the custody of the receiver prior to the filing of the libel. <sup>10</sup>

No question of federal jurisdiction is presented where a court of bankruptcy, in the exercise of its bankruptcy jurisdiction, determines the question of its jurisdiction over property in the possession of the trustee claimed to be exempt, 11 or whether it can proceed in a summary way in the particular

- 144, 12 Am. B. R. 673; Lucius v. Cawthon-Coleman Co., 196 U. S. 149, 49 L. Ed. 425, 13 Am. B. R. 696.
- Denver Nat. Bank v. Klug, 186
  U. S. 202, 46 L. Ed. 1127; Lucius v. Cawthon-Coleman Co., 196
  U. S. 149, 49 L. Ed. 425, 13 Am. B. R. 696.
- Holden v. Stratton, 191 U. S.
  115, 48 L. Ed. 116, 10 Am. B. R.
  786; Schweer v. Brown, 195 U. S.
  171, 49 L. Ed. 144.
- <sup>7</sup> Grant Shoe Co. v. Laird, 212 U. S. 445, 53 L. Ed. 591, 21 Am. B. R. 484.

- \* Babbitt v. Dutcher, 216 U. S. 102, 54 L. Ed. 405, 23 Am. B. R. 519.
- Bardes v. Hawarden Bank, 178
  U. S. 524, 44 L. Ed. 1175, 4 Am.
  B. R. 163; Mitchell v. McClure,
  178 U. S. 539, 44 L. Ed. 1182, 4
  Am. B. R. 177; Harris v. First Nat.
  Bank, 216 U. S. 382, 54 L. Ed.
  528, 23 Am. B. R. 632.
- <sup>10</sup> Hudson Oil & Supply Co. v. Booraem, 216 U. S. 604, 54 L. Ed. 536.
- <sup>11</sup> Lucius v. Cawthon-Coleman Co., 196 U. S. 149, 49 L. Ed. 425, 13 Am. B. R. 696.

instance, 12 or whether a person proceeded against in involuntary bankruptcy, is subject to be adjudged a bankrupt under the statute. 13

## § 878. Proceedings to review a jurisdictional question.

To review a jurisdictional question, the case is removed to the supreme court direct from the district court on appeal or writ of error after final decree or judgment as in other cases.

A party against whom the question of jurisdiction is decided may seek to review it, but the party in whose favor it is determined can not prosecute an appeal or writ of error on the ground that it is a "case in which the jurisdiction of the court is in issue." <sup>1</sup>

A question of jurisdiction can not be reviewed by direct appeal or writ of error before a final decree or judgment in the case,<sup>2</sup> and it must be certified at the term at which the final decree or judgment is entered.<sup>3</sup> A review may be had after final judgment or decree, although an interlocutory review has been had in the circuit court of appeals on petition for revision.<sup>4</sup>

<sup>12</sup> Schweer v. Brown, 195 U. S. 171, 49 L. Ed. 144, 12 Am. B. R. 673.

See also Bien v. Robinson, 208 U. S. 423, 52 L. Ed. 556.

<sup>13</sup> First Nat. Bank v. Klug, 186
 U. S. 202, 46 L. Ed. 1127, 8 Am.
 B. R. 12.

<sup>1</sup> Anglo-American Prov. Co. v. Davis Prov. Co., 191 U. S. 376, 48 L. Ed. 225.

<sup>2</sup> McLish v. Roff, 141 U. S. 681, 35 L. Ed. 893; Bowker v. United States, 186 U. S. 125, 46 L. Ed. 1090; Chicago, etc. R. Co. v. Roberts, 141 U. S. 690, 35 L. Ed. 905; Bardes v. Hawarden First Nat'l Bank, 175 U. S. 526, 44 L. Ed. 261.

<sup>3</sup> Colvin v. Jacksonville, 158 U. S. 456, 39 L. Ed. 1053; The Bayonne,

159 U. S. 687, 40 L. Ed. 306; In re Lehigh Min. & Mfg. Co., 156 U. S. 322, 39 L. Ed. 438.

<sup>4</sup> In Grant Shoe Co. v. Laird, 212 U. S. 445, 53 L. Ed. 591, 21 Am. B. R. 484, the supreme court said:

"Perhaps it should be mentioned that a motion to dismiss, earlier than the one we have mentioned, was made and overruled, 11 Am. B. R. 48, 125 Fed. 576, and that thereafter, on a petition for review, the decision was affirmed by the circuit court of appeals. 12 Am. B. R. 349, 130 Fed. 881. Although in the report the case is headed 'In Error to the District Court,' it appears by stipulation that the proceeding was a revisory one under section 24b of the Bank-

An appeal or writ of error may be prosecuted any time within two years from the date of the entry of the judgment or decree to be reviewed.<sup>5</sup>

An authenticated transcript of the record of the trial court must be filed in the supreme court. The record should include a certificate of the question of jurisdiction involved and all papers and proceedings necessary to the hearing of that question in the supreme court. As no other question can be considered by that court in cases of this kind,<sup>6</sup> the record should be made accordingly and all unnecessary papers omitted.<sup>7</sup>

The right of the supreme court to review on a direct proceeding concerning the jurisdiction of the court below depends upon the record and not upon the mere statement of facts made in the certificate prepared by the trial court.<sup>8</sup> The district courts are without power to make a certificate containing a statement of facts as a basis for legal propositions in relation to which the advice of the supreme court is sought as a circuit court of appeals may do.<sup>9</sup> The record, independently of the certificate, must show that the question of jurisdiction was in issue and decided by the court below. "It is the better practice in every case of direct review on a ques-

ruptcy Act, the order having been interlocutory. It is suggested that the plaintiff in error is concluded by the action of the circuit court of appeals. But notwithstanding the objections to a double resort, we do not perceive how such an interlocutory decision, even of the higher court, can prevent a case, otherwise proper to be brought here, from being taken up after a final judgment is reached."

<sup>5</sup> R. S. Sec. 1008. Grant Shoe Cα. v. Laird, 212 U. S. 445, 53 L. Ed. 591, 21 Am. B. R. 484.

<sup>6</sup> Greeley v. Lowe, 155 U. S. 58,
39 L. Ed. 69; Mexican Central R.
Co. v. Eckman, 187 U. S. 429, 432,

47 L. Ed. 245; Schunk v. Moline, etc. Co., 147 U. S. 500, 37 L. Ed. 255; Hennessy v. Richardson Drug Co., 189 U. S. 25, 33, 47 L. Ed. 697.

<sup>7</sup> See observation of the supreme court in Union Pac. R. Co. v. Stewart, 95 U. S. 279, 284, 24 L. Ed. 431.

Nichols Lumber Co. v. Franson,
 203 U. S. 278, 51 L. Ed. 181.

United States v. Rider, 163 U.
S. 132, 41 L. Ed. 101; Mexican Central R. Co. v. Eckman, 187 U.
S. 429, 432, 47 L. Ed. 245; Bardes v. Hawarden First Nat'l Bank, 175 U.
S. 526, 528, 44 L. Ed. 261; Arkansas v. Schlierholtz, 179 U.
S. 598, 601, 45 L. Ed. 335.

tion of jurisdiction to make apparent on the record by a bill of exceptions, or other appropriate mode, the fact that the question of jurisdiction was raised and passed upon and the elements upon which the decision of the question was based. <sup>10</sup> An assignment of errors can not be used for this purpose. <sup>11</sup> The opinion of the trial court may be looked to for the purpose of ascertaining the grounds of decision, <sup>12</sup> but not being a part of the record it can not be used to supply a deficiency in the record.

Cases taken to the supreme court when the only question at issue is the question of jurisdiction are entitled to be advanced on motion and heard under the rules prescribed by rule 6 in regard to motions to dismiss writs of error or appeals.<sup>13</sup>

#### § 879. The certificate.

The requirement in cases of direct review of jurisdictional questions that the "question of jurisdiction alone shall be certified to the supreme court from the court below for decision" is jurisdictional. If such certification is wanting the supreme court can not take jurisdiction.<sup>1</sup>

In order to maintain the appellate jurisdiction of the supreme court in this class of cases, the record must distinctly and unequivocally show that the court below sends up for consideration a single and definite question of jurisdiction.

<sup>10</sup> Nichols Lumber Co. v. Franson, 203 U. S. 278, 283, 51 L. Ed. 181.

<sup>11</sup> Ansbro v. United States, 159
 U. S. 695, 40 L. Ed. 310.

12 Courtney v. Pradt, 196 U. S.
 89, 49 L. Ed. 398; Loeb v. Trustees, 179 U. S. 472, 45 L. Ed. 280.

13 See Supreme Court Rule 32,
 146 U. S. 707. Aspen Min. &
 Smelt. Co. v. Billings, 150 U. S.
 31, 34, 37 L. Ed. 986.

<sup>1</sup> Maynard v. Hecht, 151 U. S. 324, 38 L. Ed. 179; Colvin v. Jack-

sonville, 157 U. S. 369, 39 L. Ed. 736; Van Wagenen v. Sewell, 160 U. S. 372, 40 L. Ed. 460; Davis & Rankin Bldg. Co. v. Barber, 157 U. S. 674, 39 L. Ed. 853; Davis v. Geissler, 162 U. S. 290, 40 L. Ed. 972; United States v. Union Pac. R. Co., 168 U. S. 512, 42 L. Ed. 561; Consolidated Water Co. v. Babcock, 173 U. S. 702, 43 L. Ed. 1186; Moran v. Hagerman, 151 U. S. 333, 38 L. Ed. 183; Courtney v. Pradt, 196 U. S. 89, 49 L. Ed. 398.

This may appear in either of two ways: by the terms of the decree appealed from and of the order allowing the appeal, or by a separate certificate of the court below.<sup>2</sup>

The general rule is that a formal certificate of the question of jurisdiction is necessary.<sup>3</sup> If both a question of jurisdiction and other questions were before the court below, and a writ of error is allowed in the usual and general form to review its judgment, without certifying or specifying the question of jurisdiction, the supreme court can not take jurisdiction under the first clause of section 5 of the act of 1891, and carried into the judicial code as section 238.<sup>4</sup>

The certificate should be made by the court below. The certificate should show the precise question of jurisdiction in issue and how it was raised and decided. It is not necessary or proper to make a statement of facts as in a case in which a circuit court of appeals seeks the advice of the supreme court on a question of law. The certificate should be signed by the judge over his official title and included in the transcript of record.

The question of jurisdiction must be certified at the term at which the final judgment or decree is entered.<sup>7</sup> It can not

<sup>2</sup> Huntington v. Laidley, 176 U. S. 676, 44 L. Ed. 630; approved Arkansas v. Schlierholtz, 179 U. S. 598, 45 L. Ed. 335.

<sup>8</sup> Courtney v. Pradt, 196 U. S. 89, 91, 49 L. Ed. 398; Maynard v. Hecht, 151 U. S. 324, 38 L. Ed. 179. For forms of certificate see Loveland's Forms of Fed. Prac., Nos. 1334 to 1336.

<sup>4</sup> Maynard v. Hecht, 151 U. S. 324, 38 L. Ed. 179; Moran v. Hagerman, 151 U. S. 333, 38 L. Ed. 183; Colvin v. Jacksonville, 157 U. S. 368, 39 L. Ed. 736; Davis & Rankin Co. v. Barber, 157 U. S. 674, 39 L. Ed. 853; VanWagener v. Sewell, 160 U. S. 369, 40 L. Ed. 461; The Bayonne, 159 U. S. 687,

40 L. Ed. 306; Arkansas v. Schlierholtz, 179 U. S. 598, 45 L. Ed. 335; Chappell v. United States, 160 U. S. 499, 508, 40 L. Ed. 510; Filhiol v. Torney, 194 U. S. 356, 48 L. Ed. 1014.

<sup>6</sup> United States v. Rider, 163 U. S. 132, 41 L. Ed. 101; Bardes v. Hawarden First Nat'l Bank, 175 U. S. 526, 528, 44 L. Ed. 261; Mexican Central R. Co. v. Eckman, 187 U. S. 429, 432, 47 L. Ed. 245; Arkansas v. Schlierholtz, 179 U. S. 598, 601, 45 L. Ed. 335.

<sup>7</sup> In re Lehigh Min. & Mfg. Co., 156 U. S. 322, 39 L. Ed. 438; Colvin v. Jacksonville, 158 U. S. 455, 39 L. Ed. 1053; The Bayonne, 159 U. S. 687, 40 L. Ed. 306.

be filed nunc pro tunc after the expiration of the term.<sup>8</sup> But if steps are taken within the term, which have the effect of continuing the case for this purpose, the jurisdiction of the court over the case may be preserved so that a certificate may be filed after the expiration of the term.<sup>9</sup> Speaking of the power of a trial judge to amend a certificate after the expiration of the term, the supreme court uses this language: "It appears to us extremely questionable, at least, whether such a certificate, which is an act of record, stands on any different ground from judgments and the like when the term has passed." <sup>10</sup>

If the record clearly shows that the sole question decided by the trial court was a single, definite question of jurisdiction and it appears from the petition for appeal or writ of error and the order granting it that it was taken to the supreme court 11 to review that question alone, no additional certificate is necessary. In the case of Shields v. Coleman 12 the supreme court said: "It is not necessary that the word 'certify' be formally used. It is sufficient if there is a plain declaration that the single matter which is by the record sent up to this court for decision is a question of jurisdiction, and the precise question clearly, fully and separately stated. No mere suggestion that the jurisdiction of the court was in issue will answer. This court will not of itself search, nor follow counsel in their search of the record, to ascertain

<sup>&</sup>lt;sup>8</sup> The Bayonne, 159 U. S. 687, 40 L. Ed. 306.

<sup>&</sup>lt;sup>9</sup> As to the power of the court over its judgment after the expiration of the term, see Hickman v. Ft. Scott, 141 U. S. 415, 35 L. Ed. 775; Bronson v. Schulten, 104 U. S. 410, 415, 26 L. Ed. 797; Michigan Ins. Bank v. Eldred, 143 U. S. 293, 299, 36 L. Ed. 162; Morse v. Anderson, 150 U. S. 156, 37 L. Ed. 1037.

Patch v. Wabash R. Co., 207
 U. S. 277, 52 L. Ed. 204.

<sup>11</sup> Excelsior W. P. Co. v. Pac. Bridge Co., 185 U. S. 282, 46 L. Ed. 910; Shields v. Coleman, 157 U. S. 168, 39 L. Ed. 660; In re Lehigh Min. & Mfg. Co., 156 U. S. 322, 39 L. Ed. 438; Huntington v. Laidley, 176 U. S. 668, 44 L. Ed. 630; Interior Const. Co. v. Gibney, 160 U. S. 217, 40 L. Ed. 401; Smith v. McKay, 161 U. S. 355, 40 L. Ed. 731; Davis v. C., C., C. & St. L. R. Co., 217 U. S. 157, 54 L. Ed. 708.
12 157 U. S. 168, 176, 177, 39 L. Ed. 660.

whether the judgment of the trial court did or did not turn on some question of jurisdiction. But the record must affirmatively show that the trial court sends up for consideration a single definite question of jurisdiction."

Applying that rule the supreme court has held that the question of jurisdiction was sufficiently certified, where the writ of error is allowed upon the petition of the original plaintiff, asking for a review of a judgment dismissing the action for want of jurisdiction and the only question tried and decided in the court below was a question of jurisdiction; 13 or where the judgment of dismissal and the prior proceedings make apparent on the record the fact that the only matter tried and decided in the circuit court were demurrers to pleas to the jurisdiction and that the petition upon which the writ of error was allowed asked only for the review of the judgment which decided that the court had no jurisdiction of the action; 14 or where the question involved was only a question of jurisdiction and the judgment recited that it had no jurisdiction of the case and therefore dismissed the suit for want of jurisdiction, and the judge certifying in the bill of exceptions that it was "held that the court did not have jurisdiction of the suit and ordered the same to be dismissed" and in the order allowing the writ of error certified in effect that it was allowed "upon the question of jurisdiction;" 15 or where the decree recited "that said suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of this court, and that this court should not further exercise jurisdiction, it is therefore ordered and decreed that said suit be and the same

18 In re Lehigh Min. & Mfg. Co.,
156 U. S. 322, 39 L. Ed. 438; Interior Const. Co. v. Gibney, 160 U. S. 217, 40 L. Ed. 401; Excelsior W. P. Co. v. Pacific Bridge Co.,
185 U. S. 282, 46 L. Ed. 910; Petri v. Creelman Lumber Co., 199 U. S. 487, 492, 50 L. Ed. 281; United

States v. Larkin, 208 U. S. 333, 52 L. Ed. 517.

14 Petri v. Creelman Lumber Co.,
 199 U. S. 487, 492, 50 L. Ed. 281;
 Interior Const. Co. v. Gibney, 160
 U. S. 217, 40 L. Ed. 401.

<sup>15</sup> In re Lehigh Min. & Mfg. Co.,
 156 U. S. 322, 327, 39 L. Ed. 438.

is hereby dismissed for want of jurisdiction" and the order allowing the appeal stated that the appeal was allowed "from the final order and decree dismissing said suit for want of jurisdiction;" <sup>16</sup> or where an appeal from a decree of the circuit court appointing a receiver was allowed by that court "solely upon the question of jurisdiction" which was the power of the circuit court to appoint a receiver and take railroad property out of the possession of the receiver appointed by the state court, and on petition praying an appeal from the decree as "taking and exercising jurisdiction." <sup>17</sup>

It has also held, where the jurisdiction was sustained and judgment on the merits rendered, that the question of jurisdiction was sufficiently certified where the record disclosed that the defendants below appealed upon the express ground that the court erred in taking jurisdiction of the bill and in not dismissing the bill for want of jurisdiction, and prayed that their appeal should be allowed and the question of jurisdiction be certified to the supreme court, and that said appeal was allowed, and the certificate further stated that there is sent a true copy of so much of the record as is necessary for the determination of the question of jurisdiction, and as a part of the record so certified is the opinion of the court below, in accordance with which defendants' motion to dismiss the cause for want of jurisdiction was denied.<sup>18</sup>

But the allowance of an appeal involving the merits as well as the jurisdiction can not be treated as sufficiently certified, where the petition for appeal was "upon the ground that this court was without jurisdiction to make the said decree," but specified no question of jurisdiction and asked "that a transcript of the record and proceedings and papers upon which said final decree was made should be sent up" as if the appeal

<sup>&</sup>lt;sup>16</sup> Excelsior W. P. Co. v. Pacific Bridge Co., 185 U. S. 282, 285, 46 L. Ed. 910.

 <sup>&</sup>lt;sup>17</sup> Shields v. Coleman, 157 U. S.
 176, 39 L. Ed. 662.

<sup>&</sup>lt;sup>18</sup> Smith v. McKay, 161 U. S. 355, 357, 40 L. Ed. 731,

were on the whole case, and the entry of the district judge thereon was "appeal allowed." <sup>19</sup> It was held that the question of jurisdiction was not sufficiently certified where after the evidence was closed the court declined to submit it to a jury and entered an order that "it appearing to the court that this court has no jurisdiction of the subject-matter of this action, it is ordered that this case be and the same is hereby dismissed at the costs of the plaintiff." <sup>20</sup>

# § 880. The trial and decision of jurisdictional questions.

Clause 1 of section 238 of the judicial code, conferring jurisdiction by direct review in a case in which the jurisdiction of the court is in issue, provides that "the question of jurisdiction alone shall be certified to the supreme court from the court below for decision."

This provision limits the jurisdiction of the supreme court in cases removed to it under this clause to the question of jurisdiction of the trial court. But the supreme court may reverse a case upon a question of fact as well as law. No other questions, which may be involved in the case, can be reviewed on such appeal or writ of error. If other questions are involved any contention on the merits is waived by the party taking the case direct to the supreme court on the question of jurisdiction. Such questions can only be determined by the circuit court of appeals, unless the case on its merits is comprehended within one of the other clauses incorporated in section 238 of the judicial code. In that

<sup>&</sup>lt;sup>19</sup> The Bayonne, 159 U. S. 687, 693, 40 L. Ed. 306.

<sup>&</sup>lt;sup>20</sup> Davis v. Geissler, 162 U. S. 290, 40 L. Ed. 972.

<sup>&</sup>lt;sup>1</sup> Commercial Mut. Accident Ins. Co. v. Davis, 213 U. S. 245, 256.

Building & Loan Ass'n v. Price,
 169 U. S. 45, 42 L. Ed. 655; Greeley v. Lowe, 155 U. S. 58, 39 L.
 Ed. 69; Hennessy v. Richardson

Drug Co., 189 U. S. 25, 47 L. Ed. 697; Mexican Central R. Co. v. Eckman, 187 U. S. 429, 432, 47 L. Ed. 245; Schunk v. Moline, etc. Co., 147 U. S. 500, 37 L. Ed. 255; United States v. Jahn, 155 U. S. 109, 112, 39 L. Ed. 87.

<sup>&</sup>lt;sup>3</sup> United States v. Jahn, 155 U.S. 109, 113, 39 L. Ed. 87.

instance the supreme court has power to determine the whole case—all questions of merit as well as jurisdiction.<sup>4</sup>

The jurisdiction of the supreme court in this class of cases depends upon the fact that a question of jurisdiction was in issue and decided in the court below and that question certified.<sup>5</sup> Until these facts are shown to exist by the record the supreme court has no power to determine the question of the jurisdiction of the trial court of the action. That court is precluded from an inquiry into the merits or even into the jurisdiction taken by the trial court until its jurisdiction of the case is established.<sup>6</sup> In cases properly within the jurisdiction of that court the rule is that it is its duty, without action of the trial court or of the parties, to look at the record to determine whether or not the court below had jurisdiction of the action.<sup>7</sup> But the supreme court can not do this, except in the exercise of its own jurisdiction.

In passing upon the question of jurisdiction the supreme court will not consider papers, testimony, etc., which form no part of the record.<sup>8</sup> It may refer to the opinion of the trial court to ascertain the grounds of the decision.<sup>9</sup> It may look to the certificate, in the absence of a proper showing in the record to ascertain when and how the question was raised and decided, but not for the purpose of supplying elements of the decision which could not be considered in an action

<sup>4</sup> Chappell v. United States, 160 U. S. 499, 509, 40 L. Ed. 510; Giles v. Harris, 189 U. S. 475, 486, 47 L. Ed. 909; Filhiol v. Torney, 194 U. S. 356, 48 L. Ed. 1014; Horner v. United States, 143 U. S. 570, 577, 36 L. Ed. 266; United States v. Jahn, 155 U. S. 109, 113, 39 L. Ed. 87; Penn Mutual Life Ins. Co. v. Austin, 168 U. S. 685, 42 L. Ed. 626.

<sup>6</sup> Arkansas v. Schlierholz, 179 U. S. 598, 600, 45 L. Ed. 335; Maynard v. Hecht, 151 U. S. 324, 38 L. Ed. 179; Davis v. Geissler, 162U. S. 290, 40 L. Ed. 972.

<sup>6</sup> Anglo-American Prov. Co. v.
 Davis Prov. Co., 191 U. S. 376, 48
 L. Ed. 225.

<sup>7</sup> Thomas v. University Trustees, 195 U. S. 207, 49 L. Ed. 160; Great Southern Fireproof Hotel Co. v. Jones, 177 U. S. 449, 44 L. Ed. 842.

<sup>8</sup> Nichols Lumber Co. v. Franson, 203 U. S. 278, 51 L. Ed. 181.

<sup>0</sup> Courtney v. Pradt, 196 U. S. 89, 49 L. Ed. 398; Loeb v. Trustees, 179 U. S. 472, 45 L. Ed. 280.

at law without a bill of exceptions.<sup>10</sup> The general rule in this respect is thus stated by Mr. Justice White: "When the record does not otherwise show when and how the question of jurisdiction was raised, the certificate of the circuit court may be considered for the purpose of supplying such deficiency when the elements necessary to decide the question are in the record, we deem it the better practice in every case of direct review on a question of jurisdiction to make apparent on the record by a bill of exceptions, or other appropriate mode, the fact that the question of jurisdiction was raised and passed upon and the elements upon which the decision of the question was based." <sup>11</sup>

In deciding the question of jurisdiction the supreme court has always declined to pass upon any other questions. Thus, if the court below committed no error in respect of the question of jurisdiction, the order of the supreme court will be to affirm the judgment or decree of the court below irrespective of any error assigned on the merits. If the court below erred in dismissing a suit for want of jurisdiction, the decree or judgment will be reversed and the case remanded for a trial on the merits in the court below. In Hennessy v. Richardson Drug Co. 14 the bill was dismissed for want of jurisdiction and also upon the merits after a hearing upon pleadings and proofs, the supreme court refused to consider the question of merits. It reversed the decree of the court below on the question of jurisdiction and sent the case back for a rehearing on the merits.

Nichols Lumber Co. v. Franson, 203 U. S. 278, 51 L. Ed. 181; North American, etc. Co. v. Morrison, 178 U. S. 262, 44 L. Ed. 1061.

<sup>&</sup>lt;sup>11</sup> Nichols Lumber Co. v. Franson, 203 U. S. 278, 51 L. Ed. 181.

 <sup>&</sup>lt;sup>12</sup> Mexican Central R. Co. v.
 Eckman, 187 U. S. 429, 433, 436,
 47 L. Ed. 245; Colvin v. Jacksonville. 158 U. S. 456, 39 L. Ed. 1053.

<sup>13</sup> Hennessy v. Richardson Drug
Co., 189 U. S. 25, 35, 47 L. Ed.
697; Greeley v. Lowe, 155 U. S. 58,
76, 39 L. Ed. 69; Building & L.
Ass'n v. Price, 169 U. S. 45, 42
L. Ed. 655; Excelsior W. P. Co.
v. Pac. Bridge Co., 185 U. S. 282,
295, 46 L. Ed. 910; Vicksburg
Waterworks v. Vicksburg, 185 U.
S. 65, 46 L. Ed. 808.

<sup>14 189</sup> U. S. 25, 47 L. Ed. 697.

If a case is taken to the circuit court of appeals which involves solely a question of the jurisdiction of a district court, that court should dismiss the writ of error or appeal for want of jurisdiction, and the case may be taken direct to the supreme court from the district court and the question of jurisdiction certified.<sup>15</sup>

If a case involving questions of jurisdiction and of merits is taken to a circuit court of appeals, that court may decide the whole case—the question of jurisdiction as well as any error assigned with respect to the merits.<sup>16</sup> It may decide the question of jurisdiction, although the assignment of errors as to the merits is abandoned.<sup>17</sup>

### § 881. Jurisdiction of bankruptcy cases from state courts.

The cases in which the decision of a state court may be reviewed by the supreme court are pointed out in the Revised Statutes, section 709.<sup>1</sup>

<sup>15</sup> Excelsior Wooden Pipe Co. v. Pacific Bridge Co., 185 U. S. 282, 46 L. Ed. 910.

16 United States v. Jahn, 155 U.
S. 109, 39 L. Ed. 87; Coler v.
Grainger County (C. C. A. 6th Cir.), 74 Fed. Rep. 16, 20 C. C. A.
267; Texas & P. R. Co. v. Bloom (C. C. A. 5th Cir.), 60 Fed. Rep. 979, 9 C. C. A. 300; the Presto (C. C. A. 5th Cir.), 93 Fed. Rep. 522, 35 C. C. A. 394; Wirgman v. Persons (C. C. A. 4th Cir.), 126 Fed. Rep. 449, 62 C. C. A. 63; Barling v. Bank (C. C. A. 9th Cir.), 50 Fed. Rep. 260, 1 C. C. A. 510.

But see Boston & M. R. Co. v. Gokey (C. C. A. 2d Cir.), 149 Fed. Rep. 42, 79 L. Ed. 64.

<sup>17</sup> Wirgman v. Persons (C. C. A. 4th Cir.), 126 Fed. Rep. 449, 62 C. C. A. 63; Coler v. Grainger County (C. C. A. 6th Cir.), 74 Fed. Rep. 16, 20 C. C. A. 267.

<sup>1</sup> Section 709 of the Revised Statutes provides that: "A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege or immunity is claimed under the constitution, or any treaty or statute of, or commission held or authority exercised under, United States, and the decision is against the title, right, privilege,

It is immaterial whether the judgment or decree was rendered in a case arising in bankruptcy or not. The state courts have jurisdiction only of suits at law or in equity which may concern bankruptcy matters, and not cases in bankruptcy strictly. The courts of bankruptcy have exclusive jurisdiction in such cases.

The supreme court has jurisdiction to revise the judgment of the highest court of a state denying a title, right, privilege or immunity under the bankrupt act set up and claimed in the state court,<sup>2</sup> but not otherwise.<sup>3</sup>

If the decision is in favor of the plaintiff in error claiming under the bankrupt act no case arises for the supreme court.4

or immunity specially set up or claimed, by either party, under such constitution, treaty, statute, commission, or authority, may be reexamined and reversed or affirmed in the supreme court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States (and the proceeding upon the reversal shall be the same, except that the supreme court may, at their discretion, proceed to a final decision of the case, and award execution, or remand the same to the court from which it was removed). [See R. S., Sec. 1017.]

"The supreme court may (reaffirm), reverse, modify, or affirm the judgment or decree of such state court, and may, at their discretion, award execution, or remand the same to the court from which it was removed by the writ."

<sup>2</sup>R. S. Sec. 709; Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. —; Rector v. City Deposit Bank, 200 U. S. 405, 50 L. Ed. 524;

Mays v. Fritton, 131 U. S. cxiv appx., 21 L. Ed. 127; Traer v: Clews, 115 U. S. 528, 29 L. Ed. 467; Dushane v. Beall, 161 U. S. 513, 40 L. Ed. 791; New Orleans, etc., R. Co. v. Delamore, 114 U. S. 501, 29 L. Ed. 244; Dimock v. Revere Copper Co., 117 U. S. 559, 24 L. Ed. 994; Roby v. Colehour, 146 U. S. 153, 36 L. Ed. 922.

<sup>3</sup> Cramer v. Wilson, 195 U. S. 408, 49 L. Ed. 256; Kenney v. Craven, 215 U. S. 125, 54 L. Ed. 122 23 Am. B. R. 516; McKenna v. Simpson, 129 U. S. 506, 32 L. Ed. 771; Boatman's Savings Bank v. State Savings Association, 114 U. S. 265, 29 L. Ed. 174; Wolf v. Stix, 96 U. S. 541, 24 L. Ed. 640; Scott v. Kelly, 22 Wall. 57, 22 L. Ed. 729; Linton v. Stanton, 12 How. 423, 13 L. Ed. 1050.

<sup>4</sup> Calcote v. Stanton, 18 How. 243, 15 L. Ed. 348; Strader v. Baldwin, 9 How. 261, 13 L. Ed. 130.

The case of Strader v. Baldwin, supra, is explained as overruled in McCormick v. Market Bank, 165 U. S. 539, 547, because the court failed to notice another right set up which was denied.

A federal question is raised under the bankrupt law, which will support a writ of error to a state court, where the validity and effect of a discharge in bankruptcy was called in question and the decision was against the debtor holding the discharge; 5 or where the judgment of a state court was against the trustee in bankruptcy, in an action between him and the bankrupt, where the question at issue was whether the matter in controversy passed to the trustee or not; 6 or where the judgment of the state court was against the trustee in bankruptcy, in an action by him to recover property from a creditor on the ground of a fraudulent preference; 7 or where a party insists that a judgment setting aside a preference can not be rendered against him consistently with the bankrupt act and the state court decides against him; 8 or where the state court in a suit against the trustee decreed a correction of errors in a written contract effecting the title to property of the bankrupt; 9 or where a sheriff was sued for moneys obtained by a sale, directed by the court of bankruptcy to be made in the state court, and the decision of the state court was adverse to that authority; 10 or where the suit was for the foreclosure of a mortgage on real estate,

<sup>5</sup> Dunbar v. Dunbar, 190 U. S. 340, 47 L. Ed. 1084, 10 Am. B. R. 139; Hennequin v. Clews, 111 U. S. 677, 28 L. Ed. 565; Strang v. Bradner, 114 U. S. 555, 29 L. Ed. 248; Neal v. Clark, 95 U. S. 704, 24 L. Ed. 586; Dimock v. Revere Copper Co., 117 U. S. 559, 29 L. Ed. 994; Long v. Bullard, 117 U. S. 617, 29 L. Ed. 1004; Palmer v. Hussey, 119 U. S. 96, 30 L. Ed. 362; Jenkins v. International Bank, 127 U. S. 484, 32 L. Ed. 189; Bluthenthal v. Jones, 208 U. S. 64, 52 L. Ed. 390, 19 Am. B. R. 288.

Williams v. Heard, 140 U. S.
 529, 35 L. Ed. 550; Dushane v.
 Beall, 161 U. S. 513, 40 L. Ed.

791; Hammond v. Whittredge, 204 U. S. 538, 51 L. Ed. 606.

<sup>7</sup> Rector v. City Deposit Bank, 200 U. S. 405, 50 L. Ed. 527, 15 Am. B. R. 336; Eau Claire Nat. Bank v. Jackman, 204 U. S. 522, 51 L. Ed. 596.

<sup>8</sup> Eau Claire Nat. Bank v. Jackman, 204 U. S. 522, 51 L. Ed. 596,
<sup>17</sup> Am. B. R. 675; Miller v. New Orleans Fertilizer Co., 211 U. S.
<sup>496</sup>, 53 L. Ed. 300, 21 Am. B. R.
<sup>416</sup>.

<sup>9</sup> Zartman v. First Nat. Bank,
 216 U. S. 134, 54 L. Ed. 418, 23
 Am. B. R. 635.

10 O'Brien v. Weld, 92 U. S. 81,23 L. Ed. 675.

when the only controversy in the case was as to the effect to be given to a sale of the property under an order of the court of bankruptcy to sell the bankrupt's mortgaged property free from encumbrances; 11 or where a state court denied an application to stay a suit and rendered final judgment against the bankrupt; 12 or where an immunity was claimed by the appellant (under the Revised Statutes, section 711) from the operation of the decree of a state court on their rights, because that statute made the jurisdiction of the courts of the United States exclusive in such cases; 13 or where a United States marshal sets up as a defense to a suit in the state court for taking possession of a bankrupt's estate that the purchase was a fraud on the bankrupt law and asserts a right to the property under such law and the decision is adverse to him; 14 or where the plaintiff in error contended that the proper construction of the bankrupt act would defeat the jurisdiction of the state court and the state court decided against the contention.15

No federal question under the bankrupt law is presented by the refusal of a state court to set aside a decree to enable the defendant to plead a discharge in bankruptcy; <sup>16</sup> or by the decision as to the legal effect of promises alleged to have been made by a bankrupt after his discharge because the legal obligation as to such promises depends upon the law of the state in which they were made; <sup>17</sup> or in a suit to recover property for the estate when the question in the state court is not whether, if the bankrupt had title, it would pass to the assignee, but whether he had title at all and the state

 <sup>&</sup>lt;sup>11</sup> Factors, etc., Ins. Co. v. Murphy, 111 U. S. 738, 28 L. Ed. 582.
 <sup>12</sup> Hill v. Harding, 107 U. S. 631, 27 L. Ed. 493.

Winchester v. Heiskell, 119 U.
 S. 450, 30 L. Ed. 462. `

<sup>&</sup>lt;sup>14</sup> Sharpe v. Doyle, 102 U. S. 686, 26 L. Ed. 277.

 <sup>15</sup> Acme Harvester Co. v. Beekman, 222 U. S. —; Murphy v. John Hofman Co., 211 U. S. 562, 53 L. Ed. 327, 21 Am. B. R. 487.

<sup>&</sup>lt;sup>16</sup> Wolf v. Stix, 96 U. S. 541, 24 L. Ed. 640.

<sup>&</sup>lt;sup>17</sup> Linton v. Stanton, 12 How. 423, 13 L. Ed. 1050.

court decided that he had not; <sup>18</sup> or where a stockholder and creditor of a corporation commenced proceedings in bankruptcy, and two others, to stop such proceedings, purchased his stock and assumed his debt and these facts were set up as a defense to their obligations for the stock; <sup>19</sup> or where the state court places its decision upon a ground which is broad enough to maintain the judgment without regard to the federal question. <sup>20</sup>

# § 882. Proceedings to transfer a case from a state court to the supreme court.

A judgment or decree, at law or in equity, of the highest court of a state is reviewable in the supreme court by writ of error only. If an appeal is taken to review the decision of a state court it will be dismissed for want of jurisdiction.

Whenever a party desires to sue out a writ of error from the supreme court to a state court he should file a petition for the writ and assignments of error and bond in the office of the clerk of the court to which the writ is to issue. The petition for the writ of error must be presented to and allowed by a justice of the supreme court of the United States or by the chief justice of the state court.<sup>3</sup> It is not sufficient that the writ be allowed by an associate justice of the state court.<sup>4</sup> If the state court is composed of a single judge or chancellor the writ may be allowed by that judge or chancellor or by a justice of the supreme court of the United

Scott v. Kelly, 22 Wall. 57, 22
 L. Ed. 729; McKenna v. Simpson,
 U. S. 506, 32 L. Ed. 771; Cramer v. Wilson, 195 U. S. 408, 49
 L. Ed. 256.

Van Norden v. Benner, 131
 U. S. cxlv appx., 24 L. Ed. 247.

<sup>20</sup> Kenney v. Craven, 215 U. S. 125, 54 L. Ed. 122, 23 Am. B. R. 516.

<sup>1</sup> R. S. Sec. 709; Cohens v. Virginia, 6 Wheat. 264, 410, 5 L. Ed. 257; Verden v. Coleman, 22 How. 192, 16 L. Ed. 336.

<sup>2</sup> Verden v. Coleman, 22 How. 192, 16 L. Ed. 336.

<sup>8</sup> R. S. Sec. 999; Havnor v. New York, 170 U. S. 408, 42 L. Ed. 1087; Butler v. Gage, 138 U. S. 52, 34 L. Ed. 869; Northwestern Union Packet Co. v. Home Ins. Co., 154 U. S. 588, 20 L. Ed. 463.

<sup>4</sup> Havnor v. New York, 170 U.
S. 408, 42 L. Ed. 1087; Bartemeyer v. Iowa, 14 Wall. 26, 20 L. Ed. 792. In Missouri Valley Land Co. v. Wiese, 208 U. S. 234, 244, 52 L. Ed. 466, a writ allowed by the pre-

States. In no case should the application be made to the supreme court of the United States unless at the request of one of the members of that court.<sup>5</sup>

Writs of error to state courts are not allowed as of right. It is the practice to submit the record of the state court to a justice of the supreme court and it is his duty to ascertain upon examination whether any question cognizable under section 709 of the Revised Statutes was decided in the proper court of the state and whether the case upon the face of the record will justify the allowance of the writ. If the petition is presented to a justice of the state court it is his duty to make a similar inquiry before allowing the writ. The allowance by a justice or judge is necessary upon a writ of error addressed to a state court.

The writ of error issues out of the supreme court. It may be issued by the clerk of that court, or for him under section 1004 of the Revised Statutes as amended by the clerk of the district court for the proper district.<sup>8</sup> It can not be issued by the clerk of the state court.<sup>9</sup> The writ is then lodged with the clerk of the state court. He should file the writ and make return of it to the supreme court.

siding judge in the absence of the chief justice from the state was sustained.

<sup>5</sup> In re Robertson, 156 U. S. 183, 39 L. Ed. 389.

In Twitchell v. Pennsylvania, 7 Wall. 321, 19 L. Ed. 223, and Spies v. Illinois, 123 U. S. 164, 31 L. Ed. 85, application was made to a justice of the supreme court and at his suggestion was permitted to be made in open court where full argument was heard.

<sup>6</sup> Twitchell v. Pennsylvania, 7 Wall. 321, 19 L. Ed. 223; Spies v. Illinois, 123 U. S. 164, 31 L. Ed. 85; *In re* Kemmler, 136 U. S. 438, 34 L. Ed. 521.

Northwestern Union Packet Co.
 Home Ins. Co., 154 U. S. 588,
 L. Ed. 463, and cases cited.

Buel v. Van Ness, 8 Wheat.
312, 5 L. Ed. 626; Ex parte Ralston, 119 U. S. 613, 30 L. Ed. 506;
Miller v. Texas, 153 U. S. 535, 38 L. Ed. 813.

R. S. Sec. 1004 was amended January 1912, 37 Stat. at L...., to give the clerk of the district court the same power in this respect as formerly the clerk of the circuit court had.

Bondurant v. Watson, 103 U.
 S. 278, 26 L. Ed. 447.

In Miller v. Texas, 153 U. S. 535, 537, 38 L. Ed. 813, the supreme court intimated that a writ of error in proper form, except that it was signed by the clerk of the state court, might be amended in that respect.

The return is made by annexing to the writ of error a transcript of the record of the state court duly certified by the clerk of the state court and lodging the same with the clerk of the supreme court.<sup>10</sup>

A citation is essential.<sup>11</sup> The writ of error brings up the record, and the citation the parties.<sup>12</sup> The citation should be addressed to the defendant in error and signed by the justice of the supreme court of the United States or by the chief justice or judge or chancellor of the state court rendering the judgment or passing the decree complained of, the adverse party to have at least thirty days' notice.<sup>13</sup> The citation should be served and returned before the return day as in other cases taken to the supreme court.<sup>14</sup>

The bond on a writ of error removing a case from a state court to the supreme court of the United States is regularly approved and the amount fixed by the justice of the supreme court or chief justice or judge or chancellor of the state court signing the citation.<sup>15</sup> If a bond is seasonably filed and in a sufficient amount it may operate as a supersedeas.<sup>16</sup>

When the writ of error with the transcript of record annexed to it is filed in the office of the clerk of the supreme court, the case is docketed and the record printed and thereafter proceedings are the same as in other cases pending in that court.

Martin v. Hunter, 1 Wheat.
 304, 361, 4 L. Ed. 97; Worcester v. Georgia, 6 Pet. 566, 8 L. Ed.
 503; United States v. Booth, 18 How. 478, 15 L. Ed. 465.

<sup>11</sup> United States v. Phillips, 121
 U. S. 254, 30 L. Ed. 914; Bailiff v. Tipping, 2 Cranch, 406, 2 L. Ed. 320.

12 Atherton v. Fowler, 91 U. S.143, 146, 23 L. Ed. 265.

18 R. S. Sec. 999.

Sup. Ct. Rule 8, par. 5, and
 Sup. Ct. Rule 9, par. 4. O'Dowd v.
 Russell, 14 Wall. 402, 20 L. Ed. 857.
 R. S. Secs. 999 and 1000.

16 R. S. Sec. 1007; Green v. Van Buskirk, 3 Wall. 448, 18 L. Ed. 245; The Slaughter-House Cases, 10 Wall. 273, 19 L. Ed. 915; Spraul v. Louisiana, 123 U. S. 516, 31 L. Ed. 233; Foster v. Kansas, 112 U. S. 201, 28 L. Ed. 629; Doyle v. Wisconsin, 94 U. S. 50, 24 L. Ed. 64.

# § 883. The decision is limited to federal questions.

A writ of error does not carry the whole case and every question in it from a state court to the supreme court. It only carries up for decision the federal questions mentioned in section 709 of the Revised Statutes.<sup>1</sup> The supreme court in cases from the state courts has no power to determine any other questions or matters.<sup>1</sup> It has uniformly declined to consider errors assigned unless restricted to the questions mentioned in the statute.

The reason for this is that the jurisdiction of the supreme court to review the proceedings of a state court is not that of a general reviewing court in error, but is limited to the specific instances of denials of federal rights, whether those pertaining to the constitutionality of federal or state statutes or to certain rights, titles, immunities and privileges of federal origin specially set up in the state court and denied by the rulings and judgment of that court.<sup>2</sup>

In this respect the power of the supreme court on writs of error to a state court differs from that in a case taken up from a federal court. Speaking on this subject in the case of Central Land Co. v. Laidley, Mr. Justice Gray used this language: "The distinction, as to the authority of this court, between writs of error to a court of the United States and writs of error to the highest court of a state, is well illustrated by two of the earliest cases relating to municipal bonds, in both of which the opinion was delivered by Mr.

<sup>1</sup> Murdock v. Memphis, 20 Wall. 590, 22 L. Ed. 429; Waters-Pierce Oil Co. v. Texas (No. 1), 212 U. S. 86, 97, 53 L. Ed. 417; Chicago Life Ins. Co. v. Needles, 113 U. S. 574, 28 L. Ed. 1084; Gelston v. Hoyt, 3 Wheat. 246, 4 L. Ed. 381; Cornell University v. Fiske, 136 U. S. 152, 34 L. Ed. 427; Sauer v. New York, 206 U. S. 536, 51 L. Ed. 1176.

<sup>2</sup> Waters-Pierce Oil Co. v. Texas (No. 1), 212 U. S. 86, 97, 53 L. Ed.

417; Rogers v. Clark Iron Co., 217 U. S. 589, 54 L. Ed. 895; Western Union Tel. Co. v. Wilson, 213 U. S. 52, 53 L. Ed. 693; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. Ed. 1061; Atchison, Topeka, etc., R. Co. v. Sowers, 213 U. S. 55, 53 L. Ed. 695.

<sup>3</sup> 159 U. S. 103, 111, 40 L. Ed. 91. See, also, Turner v. Wilkes County Commissioners, 173 U. S. 461, 43 L. Ed. 768.

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Justice Swayne, and in each of which the question presented was whether the constitution of the state of Iowa permitted the legislature to authorize municipal corporations to issue bonds in aid of the construction of a railroad. The supreme court of the state, by decisions made before the bonds in question were issued, had held that it did; but, by decisions made after they had been issued, held that it did not. judgment of the district court of the United States for the district of Iowa, following the later decisions of the state court, was reviewed on the merits and reversed by this court. for misconstruction of the constitution of Iowa.4 But a writ of error to review one of those decisions of the supreme court of Iowa was dismissed for want of jurisdiction, because, admitting the constitution of the state to be a law of the state, within the meaning of the provision of the constitution of the United States forbidding a state to pass any law impairing the obligation of contracts, the only question was of its construction by the state court." 5

If the federal question involved in the case was correctly decided by the state court the judgment of that court will be affirmed without determining any other questions not of a federal character.<sup>6</sup>

If the federal question was erroneously decided the supreme court will inquire whether there is any other matter or issue adjudged by the state court sufficiently broad to maintain the judgment. If this is found to be the case the supreme court will not consider the federal question or examine into the soundness of the decision of such other matter or issue, because no federal question will be presumed to

<sup>&</sup>lt;sup>4</sup> Gelpcke v. Dubuque, 1 Wall. 175, 206, 17 L. Ed. 520.

<sup>&</sup>lt;sup>6</sup> Mississippi & M. R. Co. v. Mc-Clure, 10 Wall. 511, 515, 19 L. Ed. 997.

<sup>&</sup>lt;sup>6</sup> Swope v. Leffingwell, 105 U. S. 3, 26 L. Ed. 939; Myrick v. Thompson, 99 U. S. 291, 25 L. Ed. 324;

Haire v. Rice, 204 U. S. 291, 51 L. Ed. 490.

<sup>&</sup>lt;sup>7</sup> Eustis v. Bolles, 150 U. S. 361, 37 L. Ed. 1111; Murdock v. Memphis, 20 Wall. 590, 22 L. Ed. 429; Gibson v. Choteau, 8 Wall. 314, 19 L. Ed. 317; Erwin v. Lowry, 7 How. 172, 12 L. Ed. 655; Rutland R. Co.

exist and the jurisdiction of the supreme court fails. In such cases it has sometimes affirmed the judgment of the court below and sometimes has dismissed the writ of error. The logical course is to dismiss the writ of error for want of jurisdiction.<sup>8</sup>

If no federal question was properly presented to or decided by the state court the order of the supreme court is regularly to dismiss the writ of error for want of jurisdiction.<sup>9</sup>

If the federal question was erroneously decided and its decision was actually necessary to the determination of the case in the state court, the supreme court will reverse the judgment for that error without deciding any other questions not of a federal nature. The order in such cases is regularly a reversal with instructions to the state court to take further proceedings in conformity with the opinion of the court. But the supreme court may direct the proper

v. Central Vermont R. Co., 159 U. S. 630, 641, 40 L. Ed. 284; O'Neil v. Vermont, 144 U. S. 323, 36 L. Ed. 450; Vandalia R. Co. v. Indiana, 207 U. S. 359, 52 L. Ed. 246.

Eustis v. Bolles, 150 U. S. 361,
37 L. Ed. 1111.

This was the judgment pronounced in Klinger v. Missouri, 13 Wall. 257, 20 L. Ed. 635; Hopkins v. McLure, 133 U. S. 380, 33 L. Ed. 660; Johnson v. Risk, 137 U. S. 300, 34 L. Ed. 683; Kreiger v. Shelby R. Co., 125 U. S. 39, 31 L. Ed. 675; New Orleans Waterworks v. Louisiana Sugar Co., 125 U. S. 18, 31 L. Ed. 607; De Saussure v. Gaillard, 127 U. S. 216, 32 L. Ed. 125; Hale v. Akers, 132 U. S. 554, 33 L. Ed. 442; Vandalia R. Co. v. Indiana, 207 U. S. 359, 52 L. Ed. 246.

See order in Waters-Pierce Oil
 Co. v. Texas (No. 2), 213 U. S.
 112, 118, 53 L. Ed. 435; Los Angeles

Farming & Milling Co. v. Los Angeles, 217 U. S. 217, 54 L. Ed. 736; Telluride Power Co. v. Rio Grande R. Co., 175 U. S. 639, 44 L. Ed. 305; Egan v. Hart, 165 U. S. 188, 41 L. Ed. 680.

10 McCullough v. Virginia, 172 U.
S. 102, 125, 43 L. Ed. 583; St. Louis
& I. M. R. Co. v. Taylor, 210 U. S.
281, 52 L. Ed. 1061; Central Nat.
Bank v. Stevens, 169 U. S. 432, 465,
42 L. Ed. 807; Murdock v. Memphis,
20 Wall. 590, 22 I. Ed. 429.

11 In Magwire v. Tyler, 8 Wall. 672, 19 L. Ed. 422, supreme court reversed a decree in equity of the supreme court of Missouri, and remanded the case, directing that a decree be entered affirming the decree of an inferior court of the state; but, upon motion of counsel, modified its judgment, so as to remand the cause for further proceedings in conformity to the opinion of the court, which was

judgment to be entered in the state court, and in several cases has done so.12

## § 884. Questions of fact not reviewable.

The supreme court will not review the findings of fact made in the state court, but accepts the findings of that court upon matters of fact as conclusive.<sup>1</sup>

The jurisdiction of the supreme court does not extend to questions of fact or of local law which are merely preliminary to or the possible basis of a federal question.<sup>2</sup>

This is true whether the facts were found by the verdict of a jury,<sup>3</sup> or by the court in an action at law tried without a jury,<sup>4</sup> or by the court in an equity case,<sup>5</sup> or a finding of fact by an inferior state court affirmed in the highest court of the state by a divided court.<sup>6</sup>

declared to "be more in accordance with the usual practice of the court in such cases."

<sup>12</sup> Stanley v. Schwalby, 162 U. S. 255, 283, 40 L. Ed. 960; Martin v. Hunter, 1 Wheat. 304, 323, 362, 4 L. Ed. 102; Fairfax v. Hunter, 7 Cranch, 603, 628, 3 L. Ed. 461; Tyler v. Magwire, 17 Wall. 253, 21 L. Ed. 576; Williams v. Bruffy, 102 U. S. 243, 26 L. Ed. 135.

<sup>1</sup> Waters-Pierce Oil Co. v. Texas (No. 1), 212 U. S. 86, 97; Chrisman v. Miller, 197 U. S. 313, 49 L. Ed. 770; Chapman, etc., Land Co. v. Bigelow, 206 U. S. 41, 51 L. Ed. 953; Hedrick v. Atchison, etc., R. Co., 167 U. S. 673, 42 L. Ed. 320; Egan v. Hart, 165 U. S. 188, 41 L. Ed. 680; Thayer v. Spratt, 189 U. S. 346, 47 L. Ed. 845; Dower v. Richards, 151 U. S. 658, 38 L. Ed. 305.

<sup>2</sup> Telluride Power Co. v. Rio Grande, etc., R. Co., 175 U. S. 639, 44 L. Ed. 305; Eau Claire Nat. Bank v. Jackman, 204 U. S. 522, 51 L. Ed. 596.

Smiley v. Kansas, 196 U. S. 447,
L. Ed. 546; Shauer v. Alterton,
U. S. 607, 38 L. Ed. 286; Baldwin v. Kansas, 129 U. S. 52, 32 L.
Ed. 640; Chicago, B. & Q. R. Co. v.
Chicago, 166 U. S. 226, 41 L. Ed.
Missouri, K. & T. R. Co. v.
Haber, 169 U. S. 613, 42 L. Ed. 878.
Dower v. Richards, 151 U. S.
38 J. Ed. 305.

<sup>5</sup> Egan v. Hart, 165 U. S. 188, 41 L. Ed. 680; Bement & Sons Co. v. National Harrow Co., 186 U. S. 70, 46 L. Ed. 1058.

<sup>6</sup> Minneapolis, St. L., etc., R. Co. v. Minnesota, 193 U. S. 53, 48 L. Ed. 614.

### § 885. The decision of the supreme court is binding upon the state court.

The state court is bound by the judgment of the supreme court and must carry it into execution according to the mandate.1

The supreme court may affirm, modify or reverse the decree or judgment of the state court.2 A mandate is then issued out of the supreme court directed to the state court commanding it to execute the judgment of the supreme court.

In case the judgment of the state court is affirmed it only remains for the state court to execute its own judgment as formerly entered.

Upon a reversal the case is regularly remanded for further proceedings not inconsistent with the opinion of the supreme court.3 But the supreme court has power in such cases to render a judgment directing the proper judgment to be entered in the state court,4 and to enforce such judgment by its process to the appellate court of the state or to the inferior court whose judgment is under review.5

If the judgment of a state court is reversed with directions to take further proceedings in conformity with the opinion of the supreme court, the state court is free to decide any question not determined by the supreme court.

<sup>1</sup> Martin v., Hunter, 1 Wheat. 304, 4 L. Ed. 97; Tyler v. Magwire, 17 Wall, 253, 21 L. Ed. 576; Fairfax v. Hunter, 7 Cranch, 603, 3 L. Ed. 461.

<sup>2</sup> R. S. Sec. 709.

In Stanley v. Schwalby, 162 U. S. 255, 282, 40 L. Ed. 960, the statutes and decisions bearing on this subject are fully considered.

. 3 Magwire v. Tyler, 8 Wall. 650, 672, 19 L. Ed. 422; Stanley v. Schwalby, 162 U. S. 255, 282, 40 L. Ed. 960.

<sup>4</sup> Stanley v. Schwalby, 162 U. S. 255, 282, 40 L. Ed. 960; Martin v. Hunter, 1 Wheat. 304, 323, 362, 4 L. Ed. 102; Fairfax v. Hunter, 7 Cranch, 603, 628, 3 L. Ed. 461; Tylerv. Magwire, 17 Wall. 253, 21 L. Ed. 576; Williams v. Bruffy, 102 U. S. 248, 26 L. Ed. 135.

<sup>5</sup> Williams v. Bruffy, 102 U. S. 248, 26 L. Ed. 135; Martin v. Hunter, 7 Cranch, 603, 3 L. Ed. 461; Clarke v. Harwood, 3 Dall 342, 1 L. Ed. 628.

supreme court affirmed a judgment of a state court on its mandate by which the state supreme court dismissed the writ of error from the inferior state court, on the ground that the record did not show a case within its jurisdiction.

A second writ of error in the case and not an application for *mandamus* is the proper remedy to correct the action of a state court in failing to obey a mandate of the supreme court by mistaking or misconstruing its judgment.<sup>7</sup>

# § 886. Cases from courts not in any organized circuit and in the District of Columbia.

The supreme court is vested with appellate jurisdiction of controversies arising in bankruptcy proceedings from courts of bankruptcy not within any organized circuit of the United States and from the District of Columbia.<sup>1</sup>

It will be observed that the jurisdiction conferred by this section is limited to reviewing the final decision in controversies at law or in equity growing out of the settlement of bankrupt estates and does not confer power to review a mere step in bankruptcy taken by a court of bankruptcy.<sup>2</sup> The supreme court has no jurisdiction of a petition for revision.<sup>3</sup> In other words, the supreme court has no appellate jurisdiction in bankruptcy proceedings from courts of bank-

<sup>6</sup> Davis v. Packard, 8 Pet. 312, 8 L. Ed. 957.

<sup>7</sup> In re Blake, 175 U. S. 114, 44 L. Ed 94; Stanley v. Schwalby, 162 U. S. 255, 40 L. Ed. 960.

The supreme court of Missouri instead of obeying the mandate of the supreme court in Magwire v. Tyler, 8 Wall. 650, 19 L. Ed. 422, dismissed the suit because there was an adequate remedy at law. On a second writ of error, Tyler v. Magwire, 17 Wall. 253, 21 L. Ed. 576, the supreme court entered a

judgment reversing that decree with costs and ordered a writ of possession. A second writ of error was taken to require the court of appeals of Virginia to obey the mandate of the supreme court. Martin v. Hunter, 1 Wheat. 304, 4 L. Ed. 102; Fairfax v. Hunter, 7 Cranch, 603, 3 L. Ed. 461.

<sup>1</sup> B. A. 1898, Sec. 24a.

<sup>2</sup> Tefft-Weller & Co. v. Munsuri, 222 U. S. 114; Munsuri v. Fricker, 222 U. S. 121.

<sup>8</sup> Munsuri v. Fricker, 222 U. S. 121.

ruptcy not within any organized circuit of the United States or from the District of Columbia.<sup>4</sup>

General Order 36 is limited to appeals in bankruptcy proceedings proper, and does not regulate the manner or the time within which an appeal or writ of error may be prosecuted to review "controversies." <sup>5</sup> The manner of taking and prosecuting a writ of error or appeal from such courts to the supreme court is regulated by the statutes governing writs of error and appeals from such courts generally.

4 In Armstrong v. Fernandez (from the district court of Porto Rico), 208 U. S. 324, 52 L. Ed. 514, 19 Am. B. R. 746, and in Audubon v. Shufeldt (from the supreme court of the District of Columbia), 181 U. S. 575, 45 L. Ed. 1009, 5 Am. B. R. 829, the supreme court exercised jurisdiction to re-

view proceedings in bankruptcy proper, but its action in this respect was subsequently overruled in Tefft-Weller & Co. v. Munsuri, 222 U. S. 114.

Knapp v. Milwaukee Trust Co.
216 U. S. 545, 553, 54 L. Ed. 610,
24 Am. B. R. 761; Tefft-Weller & Co. v. Munsuri 222 U. S. 114.

GENERAL ORDERS AND FORMS.

# GENERAL ORDERS IN BANKRUPTCY.

In pursuance of the powers conferred by the Constitution and laws upon the Supreme Court of the United States, and particularly by the act of Congress approved July 1, 1898, entitled "An act to establish a uniform system of bankruptcy throughout the United States," it is ordered, on this 28th day of November, 1898, that the following rules be adopted and established as general orders in bankruptcy, to take effect on the first Monday, being the second day, of January, 1899. And it is further ordered that all proceedings in bankruptcy had before that day, in accordance with the act last aforesaid, and being in substantial conformity either with the provisions of these general orders, or else with the general orders established by this court under the bankrupt act of 1867 and with any general rules or special orders of the courts in bankruptcy, stand good, subject, however, to such further regulation by rule or order of those courts as may be necessary or proper to carry into force and effect the bankrupt act of 1898 and the general orders of this court.

See B. A. 1898, Sec. 30.

#### T.

#### Docket.

The clerk shall keep a docket, in which the cases shall be entered and numbered in the order in which they are commenced. It shall contain a memorandum of the filing of the petition and of the action of the court thereon, of the reference of the case to the referee, and of the transmission by him to the clerk of his certified record of the proceedings, with the dates thereof, and a memorandum of all proceedings in the case except those duly entered on the referee's certified record aforesaid. The docket shall be arranged in a manner convenient for reference, and shall at all times be open to public inspection.

See sec. 99, ante.

#### II.

## Filing of Papers.

The clerk or the referee shall indorse on each paper filed with him the day and hour of filing, and a brief statement of its character.

See secs. 82 and 99, ante.

#### III.

#### Process.

All process, summons and subpoenas shall issue out of the court, under the seal thereof, and be tested by the clerk; and blanks, with the signature of the clerk and seal of the court, may, upon application, be furnished to the referees.

See secs. 204 to 210, ante.

R. S. Secs. 911-913.

#### IV.

# Conduct of Proceedings.

Proceedings in bankruptcy may be conducted by the bankrupt in person in his own behalf, or by a petitioning or opposing creditor; but a creditor will only be allowed to manage before the court his individual interest. Every party may appear and conduct the proceedings by attorney, who shall be an attorney or counsellor authorized to practice in the circuit or district court. The name of the attorney or counsellor, with his place of business, shall be entered upon the docket, with the date of the entry. All papers or proceedings offered by an attorney to be filed shall be indorsed as above required, and orders granted on motion shall contain the name of the party or attorney making the motion. Notices and orders which are not, by the act or by these general orders, required to be served on the party personally may be served upon his attorney.

**v.** 

# Frame of Petitions.

All petitions and the schedules filed therewith shall be printed or written out plainly, without abbreviation or interineation, except where such abbreviation and interlineation may be for the purpose of reference.

See secs. 163, 164, 199, 260, et scq. ante.

#### VI.

## Petition in Different Districts.

In case two or more petitions shall be filed against the same individual in different districts, the first hearing shall be had in the district in which the debtor has his domicil, and the petition may be amended by inserting an allegation of an act of bankruptcy committed at an earlier date than that first alleged, if such earlier act is charged in either of the other petitions; and in case of two or more petitions against the same partnership in different courts, each having jurisdiction over the case, the petition first filed shall be first heard, and may be amended by the insertion of an allegation of an earlier act of bankruptcy than that first alleged, if such earlier act is charged in either of the other petitions; and, in either case, the proceedings upon the other petitions may be stayed until an adjudication is made upon the petition first heard; and the court which makes the first adjudication of bankruptcy shall retain jurisdiction over all proceedings therein until the same shall be closed. In case two or more petitions shall be filed in different districts by different members of the same partnership for an adjudication of the bankruptcy of said partnership, the court in which the petition is first filed, having jurisdiction, shall take and retain jurisdiction over all proceedings in

such bankruptcy until the same shall be closed; and if such petitions shall be filed in the same district, action shall be first had upon the one first filed. But the court so retaining jurisdiction shall, if satisfied that it is for the greatest convenience of parties in interest that another of said courts should proceed with the cases, order them to be transferred to that court.

See secs. 196 and 197, ante

#### VII.

## Priority of Petitions.

Whenever two or more petitions shall be filed by creditors against a common debtor, alleging separate acts of bankruptcy committed by said debtor on different days within four months prior to the filing of said petitions, and the debtor shall appear and show cause against an adjudication of bankruptcy against him on the petitions, that petition shall be first heard and tried which alleges the commission of the earliest act of bankruptcy; and in case the several acts of bankruptcy are alleged in the different petitions to have been committed on the same day, the court before which the same are pending may order them to be consolidated, and proceed to a hearing as upon one petition; and if an adjudication of bankruptcy be made upon either petition, or for the commission of a single act of bankruptcy, it shall not be necessary to proceed to a hearing upon the remaining petitions, unless proceedings be taken by the debtor for the purpose of causing such adjudication to be annulled or vacated.

See sec. 198, ante:

#### VIII.

# Proceedings in Partnership Cases.

Any member of a partnership, who refuses to join in a petition to have the partnership declared bankrapt, shall be entitled to resist the prayer of the petition in the same

manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition, and to make proof, if he can, that the partnership is not insolvent or has not committed an act of bankruptcy, and to make all defences which any debtor proceeded against is entitled to take by the provisions of the act; and in case an adjudication of bankruptcy is made upon the petition, such partner shall be required to file a schedule of his debts and an inventory of his property in the same manner as is required by the act in cases of debtors against whom adjudication of bankruptcy shall be made.

See chapter XVII, ante.

#### IX.

# Schedule in Involunțary Bankruptcy.

In all cases of involuntary bankruptcy in which the bankrupt is absent or can not be found, it shall be the duty of the petitioning creditor to file, within five days after the date of the adjudication, a schedule giving the names and places of residence of all the creditors of the bankrupt, according to the best information of the petitioning creditor. If the debtor is found, and is served with notice to furnish a schedule of his creditors and fails to do so, the petitioning creditor may apply for an attachment against the debtor, or may himself furnish such schedule as aforesaid.

See secs. 173 to 180, ante.

As to the duty of the referee to cause such schedules to be filed, see B. A. 1898, Sec. 39, clause 6.

# X.

# Indemnity for Expenses.

Before incurring any expense in publishing or mailing notices, or in travelling, or in procuring the attendance of witnesses, or in perpetuating testimony, the clerk, marshal or referee may require, from the bankrupt or other person in whose behalf the duty is to be performed, indemnity for such expense. Money advanced for this purpose by the bankrupt or other person shall be repaid him out of the estate as part of the cost of administering the same.

B. A. 1898, Secs. 62 and 64b, clause 1

# XI.

# Amendments.

The court may allow amendments to the petition and schedules on application of the petitioner. Amendments shall be printed or written, signed and verified, like original petitions and schedules. If amendments are made to separate schedules, the same must be made separately, with proper references. In the application for leave to amend, the petitioner shall state the cause of error in the paper originally filed.

See secs. 170, 180 and 202.

# XII.

# **Duties of Referee.**

- I. The order referring a case to a referee shall name a day upon which the bankrupt shall attend before the referee; and from that day the bankrupt shall be subject to the orders of the court in matters relating to his bankruptcy, and may receive from the referee a protection against arrest, to continue until the final adjudication on his application for a discharge, unless suspended or vacated by order of the court. A copy of the order shall forthwith be sent by mail to the referee, or be delivered to him personally by the clerk or other officer of the court. And thereafter all the proceedings, except such as are required by the act or by these general orders to be had before the judge, shall be had before the referee.
- 2. The time when and the place where the referees shall act upon the matters arising under the several cases referred to them shall be fixed by special order of the judge, or by the referee; and at such times and places the referees may perform the duties which they are empowered by the act to perform.

3. Applications for a discharge, or for the approval of a composition, or for an injunction to stay proceedings of a court or officer of the United States or of a State, shall be heard and decided by the judge. But he may refer such an application, or any specified issue arising thereon, to the referee to ascertain and report the facts.

See sec. 83, et seg., ante.

### XIII.

# Appointment and Removal of Trustee.

The appointment of a trustee by the creditors shall be subject to be approved or disapproved by the referee or by the judge; and he shall be removable by the judge only. See secs. 351, 352 and 363, ante.

# XIV.

# No Official or General Trustee.

No official trustee shall be appointed by the court, nor any general trustee to act in classes of cases.

#### XV.

# Trustee Not Appointed in Certain Cases.

If the schedule of a voluntary bankrupt discloses no assets, and if no creditor appears at the first meeting, the court may, by order setting out the facts, direct that no trustee be appointed; but at any time thereafter a trustee may be appointed, if the court shall deem it desirable. If no trustee is appointed as aforesaid, the court may order that no meeting of the creditors other than the first meeting shall be called.

See secs. 351 and 352, ante

#### XVI.

# Notice to Trustee of His Appointment.

It shall be the duty of the referee, immediately upon the appointment and approval of the trustee, to notify him in person or by mail of his appointment; and the notice shall require the trustee forthwith to notify the referee or his acceptance or rejection of the trust, and shall contain a statement of the penal sum of the trustee's bond.

See sec. 354, ante.

#### XVII.

#### **Duties of Trustee.**

The trustee shall, immediately upon entering upon his duties, prepare a complete inventory of all the property of the bankrupt that comes into his possession. trustee shall make a report to the court, within twenty days after receiving the notice of his appointment, of the articles set off to the bankrupt by him, according to the provisions of the forty-seventh section of the act, with the estimated value of each article, and any creditor may take exceptions to the determination of the trustee within twenty days after the filing of the report. The referee may require the exceptions to be argued before him, and shall certify them to the court for final determination at the request of either party. In case the trustee shall neglect to file any report or statement which it is made his duty to file or make by the act, or by any general order in bankruptcy, within five days after the same shall be due, eit shall be the duty of the referee to make an order requiring the trustee to show cause before the judge, at a time specified in the order, why he should not be removed from The referee shall cause a copy of the order to be served upon the trustee at least seven days before the time fixed for the hearing, and proof of the service thereof

to be delivered to the clerk. All accounts of trustees shall be referred as of course to the referee for audit, unless otherwise specially ordered by the court.

See sec. 357, ante.

#### XVIII.

# Sale of Property.

- 1. All sales shall be by public auction unless otherwise ordered by the court.
- 2. Upon application to the court, and for good cause shown, the trustee may be authorized to sell any specified portion of the bankrupt's estate at private sale; in which case he shall keep an accurate account of each article sold, and the price received therefor, and to whom sold; which account he shall file at once with the referee.
  - 3. Upon petition by a bankrupt, creditor, receiver or trustee, setting forth that a part or the whole of the bankrupt's estate is perishable, the nature and location of such perishable estate, and that there will be loss if the same is not sold immediately, the court, if satisfied of the facts stated and that the sale is required in the interest of the estate, may order the same to be sold, with or without notice to the creditors, and the proceeds to be deposited in court.

See sec. 560, ct seq., ante.

# XIX.

# Accounts of Marshal.

The marshal shall make return, under oath, of his actual and necessary expenses in the service of every warrant addressed to him, and for custody of property, and other services, and other actual and necessary expenses paid by him, with vouchers therefor whenever practicable, and also with a statement that the amounts charged by him are just and reasonable.

See sec. 102, ante.

# XX.

# Papers Filed After Reference.

Proofs of claims and other papers filed subsequently to the reference, except such as call for action by the judge, may be filed either with the referee or with the clerk.

#### XXI.

# Proof of Debts.

- I. Depositions to prove claims against a bankrupt's estate shall be correctly entitled in the court and in the cause. When made to prove a debt due to a partnership, it must appear on oath that the deponent is a member of the partnership; when made by an agent, the reason the deposition is not made by the claimant in person must be stated; and when made to prove a debt' due to a corporation, the deposition shall be made by the treasurer, or, if the corporation has no treasurer, by the officer whose duties most nearly correspond to those of treasurer. Depositions to prove debts existing in open account shall state when the debt became or will become due; and if it consists of items maturing at different dates the average due date shall be stated, in default of which it shall not be necessary to compute interest upon it. All such depositions shall contain an averment that no note has been received for such account, nor any judgment rendered thereon. Proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred.
- 2. Any creditor may file with the referee a request that all notices to which he may be entitled shall be addressed to him at any place, to be designated by the post-office box or street number, as he may appoint; and thereafter, and until some other designation shall be made by such creditor, all notices shall be so addressed; and in other

cases notices shall be addressed as specified in the proof of debt.

- 3. Claims which have been assigned before proof shall be supported by a deposition of the owner at the time of the commencement of proceedings, setting forth the true consideration of the debt and that it is entirely unsecured, or if secured, the security, as is required in proving secured claims. Upon the filing of satisfactory proof of the assignment of a claim proved and entered on the referee's docket, the referee shall immediately give notice by mail to the original claimant of the filing of such proof of assignment; and, if no objection be entered within ten days, or within further time allowed by the referee, he shall make an order subrogating the assignee to the original claimant. If objection be made, he shall proceed to hear and determine the matter.
- 4. The claims of persons contingently liable for the bankrupt may be proved in the name of the creditor when known by the party contingently liable. When the name of the creditor is unknown, such claim may be proved in the name of the party contingently liable; but no dividend shall be paid upon such claim, except upon satisfactory proof that it will diminish pro tanto the original debt.
- 5. The execution of any letter of attorney to represent a creditor, or of an assignment of claim after proof, may be proved or acknowledged before a referee, or a United States commissioner, or a notary public. When executed on behalf of a partnership or of a corporation, the person executing the instrument shall make oath that he is a member of the partnership, or a duly authorized officer of the corporation on whose behalf he acts. When the person executing is not personally known to the officer taking the proof or acknowledgment, his identity shall be established by satisfactory proof.
- 6. When the trustee or any creator shall desire the reexamination of any claim filed against the bankrupt's estate, he may apply by petition to the referee to whom the case is referred for an order for such re-examination,

and thereupon the referee shall make an order fixing a time for hearing the petition, of which due notice shall be given by mail addressed to the creditor. At the time appointed the referee shall take the examination of the creditor, and of any witnesses that may be called by either party, and if it shall appear from such examination that the claim ought to be expunged or diminished, the referee may order accordingly.

See secs. 328 to 350, ante.

#### XXII.

# Taking of Testimony.

The examination of witnesses before the referee may be conducted by the party in person or by his counsel or attorney, and the witnesses shall be subject to examination and cross-examination, which shall be had in conformity with the mode now adopted in courts of law. A deposition taken upon an examination before a referee shall be taken down in writing by him, or under his direction, in the form of narrative, unless he determines that the examination shall be by question and answer. When completed it shall be read over to the witness and signed by him in the presence of the referee. The referee shall note upon the deposition any question objected to, with his decision thereon; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just.

See chapter XXXI, ante.

# XXIII.

# Orders of Referee.

In all orders made by a referee, it shall be recited, according as the fact may be, that notice was given and the manner thereof; or that the order was made by consent; or that no adverse interest was represented at the hearing; or that the order was made after hearing adverse interests.

See sec. 91, ante.

# XXIV.

# Transmission of Proved Claims to Clerk.

The referee shall forthwith transmit to the clerk a list of the claims proved againt an estate, with the names and addresses of the proving creditors.

See sec. 99, ante.

# XXV.

# Special Meeting of Creditors.

Whenever, by reason of a vacancy in the office of trustee, or for any other cause, it becomes necessary to call a special meeting of the creditors in order to carry out the purposes of the act, the court may call such a meeting, specifying in the notice the purpose for which it is called.

See sec. 287, ante

# XXVI.

# Accounts of Referee.

Every referee shall keep an accurate account of his travelling and incidental expenses, and of those of any clerk or other officer attending him in the performance of his duties in any case which may be referred to him; and shall make return of the same under oath to the judge, with proper vouchers when vouchers can be procured, on the first Tuesday in each month.

See sec. 82, ante.

# XXVII.

# Review by Judge.

When a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon.

See secs, 93 to 95, antc.

# XXVIII.

# Redemption of Property and Compounding of Claims.

Whenever it may be deemed for the benefit of the estate of a bankrupt to redeem and discharge any mortgage or other pledge, or deposit or lien, upon any property, real or personal, or to relieve said property from any conditional contract, and to tender performance of the conditions thereof, or to compound and settle any debts or other claims due or belonging to the estate of the bankrupt, the trustee, or the bankrupt, or any creditor who has proved his debt, may file his petition therefor; and thereupon the court shall appoint a suitable time and place for the hearing thereof, notice of which shall be given as the court shall direct, so that all creditors and other persons interested may appear and show cause, if any they have, why an order should not be passed by the court upon the petition authorizing such act on the part of the trustee.

#### XXIX.

# Payment of Moneys Deposited.

No moneys deposited as required by the act shall be drawn from the depository unless by check or warrant, signed by the clerk of the court, or by a trustee, and countersigned by the judge of the court, or by a referee designated for that purpose, or by the clerk or his assistant under an order made by the judge, stating the date, the sum, and the account for which it is drawn; and an entry of the substance of such check or warrant, with the date thereof, the sum drawn for, and the account for which it is drawn, shall be forthwith made in a book kept for that purpose by the trustee or his clerk; and all checks and drafts shall be entered in the order of time in which they are drawn, and shall be numbered in the case of each estate. A copy of this general order shall be furnished to the

depository, and also the name of any referee or clerk authorized to countersign said checks.

See secs. 359 and 599, ante.

#### XXX.

# Imprisoned Debtor.

If, at the time of preferring his petition, the debtor shall be imprisoned, the court, upon application, may order him to be produced upon habeas corpus, by the jailor or any officer in whose custody he may be, before the referee, for the purpose of testifying in any matter relating to his bankruptcy; and, if committed after the filing of his petition upon process in any civil action founded upon a claim provable in bankruptcy, the court may, upon like application, discharge him from such imprisonment. If the petitioner, during the pendency of the proceedings in bankruptcy, be arrested or imprisoned upon process in any civil action, the district court, upon his application, may issue a writ of habeas corpus to bring him before the court to ascertain whether such process has been issued for the collection of any claim provable in bankruptcy, and if so provable he shall be discharged; if not, he shall be remanded to the custody in which he may lawfully be. Before granting the order for discharge the court shall cause notice to be served upon the creditor or his attorney, so as to give him an opportunity of appearing and being heard before the granting of the order.

See sec. 639 et seq. ante.

# XXXI.

# Petition for Discharge.

The petition of a bankrupt for a discharge shall state concisely, in accordance with the provisions of the act and the orders of the court, the proceedings in the case and the acts of the bankrupt.

See sec. 711, ante.

#### XXXII.

# Opposition to Discharge or Composition.

A creditor opposing the application of a bankrupt for his discharge, or for the confirmation of a composition, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file a specification in writing of the grounds of his opposition within ten days thereafter, unless the time shall be enlarged by special order of the judge.

See sec. 714 et seq. ante.

# XXXIII.

### Arbitration.

Whenever a trustee shall make application to the court for authority to submit a controversy arising in the settlement of a demand against a bankrupt's estate, or for a debt due to it, to the determination of arbitrators, or for authority to compound and settle such controversy by agreement with the other party, the application shall clearly and distinctly set forth the subject-matter of the controversy, and the reason why the trustee thinks it proper and most for the interest of the estate that the controversy should be settled by arbitration or otherwise.

See sec. 708, ante.

# XXXIV.

# Costs in Contested Adjudication.

In cases of involuntary bankruptcy, when the debtor resists an adjudication, and the court, after hearing, adjudges the debtor a bankrupt, the petitioning creditor shall recover, and be paid out of the estate, the same costs that are allowed to a party recovering in a suit in equity; and if the petition is dismissed, the debtor shall recover like costs against the petitioner.

See sec. 249, ante.

# XXXV.

# Compensation of Clerks, Referees and Trustees.

- 1. The fees allowed by the act to clerks shall be in full compensation for all services performed by them in regard to filing petitions or other papers required by the act to be filed with them, or in certifying or delivering papers or copies of records to referees or other officers, or in receiving or paying out money; but shall not include copies furnished to other persons, or expenses necessarily incurred in publishing or mailing notices or other papers.
- 2. The compensation of referees, prescribed by the act, shall be in full compensation for all services performed by them under the act, or under these general orders; but shall not include expenses necessarily incurred by them in publishing or mailing notices, in travelling, or in perpetuating testimony, or other expenses necessarily incurred in the performance of their duties under the act and allowed by special order of the judge.
- 3. The compensation allowed to trustees by the act shall be in full compensation for the services performed by them; but shall not include expenses necessarily incurred in the performance of their duties and allowed upon the settlement of their accounts.
- 4. In any case in which the fees of the clerk, referee and trustee are not required by the act to be paid by a debtor before filing his petition to be adjudged a bankrupt, the judge, at any time during the pendency of the proceedings in bankruptcy, may order those fees to be paid out of the estate; or may, after notice to the bankrupt, and satisfactory proof that he then has or can obtain the money with which to pay those fees, order him to pay them within a time specified,

and, if he fails to do so, may order his petition to be dismissed. He may also, pending such proceedings, both in voluntary and involuntary cases, order the commissions of referees and trustees to be paid immediately after such commissions accrue and are earned (as amended December 11, 1905, 199 U. S. 618). See secs. 98, 100, 364, 365, 366 and 367, ante.

# XXXVI. Appeals.

- 1. Appeals from a court of bankruptcy to a circuit court of appeals, or to the supreme court of a Territory, shall be allowed by a judge of the court appealed from or of the court appealed to, and shall be regulated, except as otherwise provided in the act, by the rules governing appeals in equity in the courts of the United States.
- 2. Appeals under the act to the Supreme Court of the United States from a circuit court of appeals, or from the supreme court of a Territory, or from the supreme court of the District of Columbia, or from any court of bankruptcv whatever, shall be taken within thirty days after the judgment or decree, and shall be allowed by a judge of the court appealed from, or by a justice of the Supreme Court of the United States.
- 3. In every case in which either party is entitled by the act to take an appeal to the Supreme Court of the United States, the court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon, stated separately; and the record transmitted to the Supreme Court of the United States on such an appeal' shall consist only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law.

See secs. 855, 858 and 886, ante.

#### XXXVII.

# General Provisions.

In proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the Supreme Court of the United States shall be followed as nearly as may be. In proceedings at law, instituted for the same purpose, the practice and procedure in cases at law shall be followed as nearly as may be. But the judge may, by special order in any case, vary the time allowed for return of process, for appearance and pleading, and for taking testimony and publication, and may otherwise modify the rules for the preparation of any particular case so as to faciliate a speedy hearing.

### XXXVIII.

#### Forms.

The several forms annexed to these general orders shall be observed and used, with such alterations as may be necessary to suit the circumstances of any particular case. 7. S. 经代数/2017

# BANKRUPTCY.

# PETITIONS, SCHEDULES ADJUDICATION AND ORDER OF REFERENCE.

#### No. 1.

# Debtor's Petition

(Official Form No. 1.)

To the Honorable —, Judge of the District Court of the United States, for the — District of —:

The petition of ——, of ——, in the county of ——, and district and state of ——, —— [state occupation], respectfully represents:

That he has had his principal place of business [or, has resided, or, has had his domicile] for the greater portion of six months next immediately preceding the filing of this petition at ——, within said judicial district; that he owes debts which he is unable to pay in full; that he is willing to surrender all his property for the benefit of his creditors except such as is exempt by law, and desires to obtain the benefit of the acts of Congress relating to bankruptcy.

That the schedule hereto annexed, marked A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and (so far as it is possible to ascertain) the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts:

That the schedule hereto annexed, marked B, and verified by your petitioner's oath, contains an accurate inventory of all his property, both real and personal, and such further statements concerning said property as are required by the provisions of said acts:

Wherefore your petitioner prays that he may be adjudged by the court to be a bankrupt within the purview of said acts.

----, Attorney.

United States of America, District of ----, ss.

I, —, the petitioning debtor mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief. —,

Petitioner.

Subscribed and sworn to before me this —— day of ——, A. D. 19—.1

[Official character.]

(1) Oaths required by the act, except upon hearings in court, may be administered by referees and by officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the state where the same are to be taken. Bankrupt Act of 1898, ch. 4, sec. 20.

The oath should be made by the petitioner or some one familiar with the facts. In re Nelson, 98 Fed. Rep. 76; Leidigh Carriage Co. vs. Stengel. (C. C. A. 6 Cir.) 95 Fed. Rep. 637, 2 Am. B. R. 283; in re Chequasset Bank, 7 Am. B. R. 87; Green River Deposit Bank vs. Craig Bros., 6 Am. B. R. 381.

# . No. 2.

# Voluntary Petition by a Corporation.

To the Honorable —, Judge of the District Court of the United States, for the —, District of —.

The petition of the A. B. Company, a corporation organized under the laws of the State of ——, and having its principal place of business at ——, in the State of ——, and not a municipal, railroad, insurance, or banking corporation, respectfully represents:

That it has had its principal place of business (or has had its domicile) for the greater portion of six months next immediately preceding the filing of this petition at ——, within said judicial district.

That this petition is filed pursuant to a resolution passed by the Board of Directors at a regular meeting held on the ——day of ——, at ——; that the corporation owes debts which it

is unable to pay in full; that it is willing to surrender all its property for the benefit of its creditors and desires to obtain the benefit of the acts of Congress relating to bankruptcy:

That the schedule hereto annexed, marked A, verified by the president of your petitioner under oath, contains a full and true statement of all of its debts, and (so far as it is possible to ascertain) the names and places of residence of its creditors, and such further statements concerning said debts as are required by the provisions of said acts.

That the schedule hereto annexed, marked B, and verified by the president of your petitioner under oath, contains an accurate inventory of all of its property, both real and personal, and such further statements concerning said property as are required by the provisions of said acts.

Wherefore your petitioner prays that it may be adjudged by the court to be a bankrupt within the purview of said acts.

[CORPORATE SEAL.] THE A. B. COMPANY,
By A. B., President.

-, Attorney.

United States of America, — District of —, ss.

I, A. B., president of the A. B. Company, the petitioning debtor mentioned and described in the foregoing petition, do make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief, and in pursuance of a resolution passed by the Board of Directors at a regular meeting held on the —— day of ——, I have signed the corporate name and affixed the corporate seal to said petition.

A. B.

Subscribed and sworn to before me this —— day of ——.

A. S.,

Notary Public.

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Schedule A.—Statement of all Debts of Bankrupt.

In the District Court of the United States for the —— District of ...

A. B., Bankrupt.

Sankrupt.

Statement of all creditors who are to be paid in full, or to whom priority is secured by law.

N. B.—Claims are to be entered in the following order, viz.: (1).—Taxes and debts due and owing to the States. (2).—Taxes due and owing to the state, or to any country, district, or municipality. (3).—Wages due workmen, clerks, or servent and owing to the state, or to any country, district, or municipality. (3).—Wages due workmen, clerks, or servent. SCHEDULE A. (I)

Other debts having	AMOUNT.					<del></del>
s before filing the petition. (4).— (	NATURE AND CONSIDERATION OF DEBT, AND WHETHER CONTRACTED AS PARTNER OR JOINT CONTRACTOR; AND IF SO, WITH WHOM.	Taxes and debts to United States.	State and county taxes paya- ble to Treasurer of —— county, ——.	For wages as clerk.	For wages as laborer.	Total , A. B., Petitioner.
h, earned within three month end of the statement.	WHERE AND WHEN CONTRACTED.			At, from190, to190,	At	
ants, to an amount not exceeding \$300 each, earned within three months before filing the petition. (4).— Other debts having priority by law. It has been another the bankrupt at the end of the statement.	NAMES AND RESIDENCES OF CREDITORS. IF RESIDENCE UNKNOWN, THAT FACT MUST BE STATED.			G. D. St.	E. F. No. St.	I owe no other debts having priority by law,
ants, 1 priorit This sheet mus	REFERENCE TO LEDGER OR VOUCHER.			15	15	

# SCHEDULE A. (2)

Creditors Holding Securities.

-

N. B.—Particulars of securities held, with date of same, and when they were given, to be stated under the names of the several creditors, and also particulars concerning each debt, as required by Acts of Congress relating to bankrupkey, and whether This sheet should be signed by the bankrupt at the end of the statement.

AMOUNT OF DEBTS.	₩-		<del>60</del>	
VALUE OF SECURITIES.	\$ <del>\$</del>			
When and where debts were contracted.	At, 190	At,,	Total	A. B., Petitioner.
DESCRIPTION OF SECURITIES,	Mortgage on lots — and —, sion —,	Z. F. Co., held as collateral.		
REFER- NAMES AND RESIDENCES ENCE TO OF CREDITORS. IF RES- EDERR OF THAT FACT MUST BE STATED.	S. Trust Co., Bidg.,	Nat, Bank,		
REFER- N. ENCE TO LEDGER OR VOUCHER.	42	10		

# SCHEDULE A. (3)

Creditors Whose Claims are Unsecured.

N. B.—When the name and residence [or either] of any drawer, maker, indorser, or holder of any bill or note, etc., are unknown, the fact must be stated, and also the name and residence of the last holder known to the debtor. The debt due to each creditor must be stated in full, and any claim by way of set-off stated in the schedule of property.

This sheet should be signed by the bankrupt at the end of the statement.

AMOUNT.			<del></del>			<del>60</del> -
NATURE AND CONSIDERATION OF THE DEBT, AND WHEHER ANY JUDG-MENT, BOAD, BILL OF EXCHANGE, PROMISSORY NOTE, PTC, AND WHETHER CONTRACTED AS PATINER OR JOINT CONTRACTED AS PATINE OR JOINT CONTRACTOR WITH ANY WHOM,	Merchandise,	Professional services.	The above were contracted by me individually. The following were contracted by me as partner in the firm of A. B. & Co., and for which the other partners, X. Y. and W. Z., are liable jointly with me.	Merchandise.	Evidenced by promissory note of A. B. & Co.	Total
When and where contracted.	At, 190—.	At, 190—,		atat		
NAMES AND RESIDENCES OF CREDITORS, IF RESIDENCE UNKNOWN, THAT FACT MUST BE STATED.	G. H. St. At	J. J. St. At	38	L. K. St. at	M. N. No. St. at	
Refer- ENCE TO LEDGER OR VOUCHER,	18	24		134	11	

# SCHEDULE A. (4)

Liabilities on Notes or Bills Discounted, which ought to be paid by the Drawers, Makers, Acceptors, or Indorsers. N. B.—The dates of the notes or bills, and when due, with their names, residences, and the business or occupation of the drawers, makers, or acceptors thereof, are to be set forth under the names of the holders. If the names of the holders are not known, the name of the last holder known to the debtor shall be stated, and his business and place of residence. The same particulars as to notes or bills on which the debtor is liable as indorser.

This sheet should be signed by the bankrupt at the end of the statement.

AMOUNT.	₩
NATURE OF LIABILITY, WHETHER SAME WAS CONTRACTED AS PARINER OB JOINT CONTRACTOR, OR WITH ANY OTHER PERSON; AND IF SO, WITH WHOM.	Note of R. D., endorsed to \$-said holder by said firm of A. B. & Co., of which X. Y., and W. Z. were the other partners.  A. B., Petitioner.
Place where contracted.	
REFER- NAMES AND RESIDENCES OF HOLDERS AS FAR AS KNOWN. LEDGER ON IF RESIDENCE UNKNOWN, THAT FACT MUST BE STATED.	C. Bank,
REFERENCE TO LEDGER OR VOUCHER.	

# SCHEDULE A. (5)

Accommodation Paper.

N. B.—The dates of the notes or bills, and when due, with the names and residences of the drawers, makers, and acceptors thereof, are to be set forth under the names of the holders; if the bankrupt be liable as drawer, maker, acceptor, or indorser there of, it is to be stated accordingly. If the names of the holders are not known, the name of the last holder known to the debox should be stated, with his residence. Same particulars as to other commercial paper.

This sheet should be signed by the bankrupt at the end of the statement.

AMOUNT.	-		<u>                                     </u>
WHETHER TIABILITY WAS CONTRACTED AS PARTNER OR JOINT CONTRACTOR, OR WITH ANY OTHER PERSON, AND, IF SO, WITH WHOM.	Liable individually.	Liable jointly with X, Y. \$-and W. Z., as partner in firm of A. B. & Co.	Total A. B., Petitioner.
PLACE WHERE CON- TRACTED			
AMES AND RESIDENCES OF HOLDERS. IF RESI- DEN OES UNKNOWN, DENCES OF PERSONS WHERE CON- STATED.	- St. No St.	St. No. St. St.	
RESIDENCES IF. RESI- UNKNOWN, MUST BE	Sc.	St.	
NAMES AND RESIDENCES OF HOLDERS. IF RESIDENCES DENCES UNKNOWN, THAT FACT MUST BE STATED.	P. Q. No.	T. U. No.	
REFERENCE TO LEDGER OR VOUCHER.			

# OATH TO SCHEDULE A.

United States of America, District of —, s

On this —— day of ——, A. D. 18—, before me personally came —— , the person mentioned in and who subscribed to the foregoing schedule, and who, being by me first duly sworn, did declare the said schedule to be a statement of all his debts, in accordance with the Acts of Congress relating to bankruptcy.

[Official character.] Subscribed and sworn to before me this —— day of ——, A. D. 18—. (1) Loveland's Bank., secs. 60 and 81.

Bankrupt.	
ŏ	
Property (	
all	
of	
B Statement	
Schedule	

			ESTIMATED		<del>\$</del>	   		   		
•	SCHEDULE B. (I)	Real Estate.		STATEMENT OF PARTICU- LARS RELATING THERE- TO.	Said mortgage given by A. Z. and assumed by me.			Total A. B	Petitioner.	
Scriedule Demonstrate of the Paris	r the District of	y, No. —	at the end of the statement.	INCUMBRANCES THEREON, IF ANY, AND DATES THEREOF.	Mortgage of \$ to S. Trust. Co., dated,	190—.	No incumbrances.			
Scriedure De	In the District Court of the United States for the District of	In the matter of A. B.,	Bankrupt.  N. B.— This sheet must be signed by the bankrupt at the end of the statement.	LOCATION AND DESCRIPTION OF ALL REAL ES. INCUMBRANCES THEREOR, IF STATEMENT OF PARTICU- TATE OWNED BY DESTOR, OR HELD BY HIM. ANY, AND DATES THEREOF. TO.	Lots and in subdivision, Mortgage of \$ to S. A. Z. and assumed by me. \$ -ide of street, and running Trust. Co., dated —	back feet to alley. Tract of acres in N. E. quarter of	sect, T, R, county,, more particularly described in deed re-	corded in said county in Deed BOOK,		

# SCHEDULE B. (2)

Personal Property.

N. B.— This sheet must be signed by the debtor at the end of the statement.

A.	Cash on hand,	\$	
В.	Bills of exchange, promissory notes, or securities of any description (each to be set out separately).		
Pro	missory note of B. R., endorsed by X. Z.,	\$	<u>-</u>
C.	Stock in trade in my business of dry goods mer- chant ———— at ————— of the value,	\$	<del></del>
D.	Household goods and furniture, household stores, wearing apparel, and ornaments of the person, viz., all situated at No. ———————————————————————————————————	\$	
E.	Books, prints, and pictures, viz., family pictures at No St., - , valued at,	\$	
F.	Horses, cows, sheep, and other animals (with number of each), viz.,	None.	
G.	Carriages, and other vehicles, viz.,	None.	
H.	Farming stock, and implements of husbandry, viz.,	None.	
I.	Shipping, and shares in vessels, viz.,	None.	
K.	Machinery, fixtures, apparatus, and tools used in business, with the place where each is situated, viz.,	None.	
L.	Patents, copyrights, and trade-marks, viz.,	None.	
M.	Goods or personal property of any other description, with the place where each is situated, viz.,	None.	į
	Total,	\$	==
	<b>'</b>	A T	3

A. B., Petitioner.

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# Schedule B. (3) Choses in Action.

Ν.	B.— This sheet must be signed at the end thereof by the debt	or.	
A.	Debts due petitioner on open account, as follows:  J. S. \$		
		\$	
В.	Stocks in incorporated companies, interest in joint stock companies, and negotiable bonds, as follows:  ———————————————————————————————————	<b>*</b>	
	Schedule A (2).	\$	
C.	Policies of Insurance, as follows:  No. —— in N. Y. L. Co. surrender value.  No. —— in X. Y. Z. Co. surrender value.	\$ None.	
D.	Unliquidated Claims of every nature, with their estimated value, as follows:	None.	
E.	Deposits of money in banking institutions and elsewhere, as follows:	None.	
	Total,	\$	<u> </u>
_	A. B.		

# Schedule B. (4)

Property in reversion, remainder, or expectancy, including proprty held in trust for the debtor or subject to any power or right to dispose of or to charge.

N. B.— A particular description of each interest must be entered. If all or any of the debtor's property has been conveyed by deed of assignment, or otherwise, for the benefit of creditors, the date of such deed should be stated, the name and address of the person to whom the property was conveyed, the amount realized from the proceeds thereof, and the disposal of the same, as far as known to the debtor. This sheet must be signed at the end thereof by the debtor.

GENERAL INTEREST.	PARTICULAR DESCRIPTION.	SUPPOSED VALUE OF MY INTEREST.
Interest in land,	A beneficial interest under will of J. B. to house and lot on V. St.  ———————————————————————————————————	
Personal property,	to A. B., G. B. of the survivor.	None.
Property in money, stocks, shares, bonds, annuities, etc.	ν.	None.
Rights and powers, legacies and be- quests.		None.
	Total,	\$

	A MOTING THE AT TOTAL
PROPERTY HERETOFORE CONVEYED FOR BENEFIT OF CREDITORS.	FROM PROCEEDS OF PROPERTY CONVEYED,
What portion of debtor's property has been conveyed by deed of assignment, or otherwise, for benefit of creditors; date of such deed, name and address of party to whom conveyed; amount realized therefrom, and disposal of same, so far as known to debtor.  What sum or sums have been paid to counsel, and to whom, for services rendered or to be rendered in this bankruptcy.  Total,	None.
А. В.	
Schedule B. (5)	
A particular statement of the property claimed, as exempted from Acts of Congress relating to Bankruptcy, giving each item valuation; and, if any portion, of it is real estate, its local present use.	the operation of the of property and its tion, description, and
N. B.— This sheet must be signed by the debtor at the end of t	he statement.
Property claimed to be exempted by State laws, its valuation; whether real or personal; its description and present use; and reference given to the statute of the State creating the exemption, as follows:  All household furniture, household stores and wearing apparel and family fixtures claimed by me as a married man, the head and support of a family, under section —— Revised Statutes of ——.	,
Total, A. B.	\$
A. B.	
Schedule B. (6)	
Books, Papers, Deeds, and Writings relating to Bankrupt's	Business and Estate.
N. B. This sheet must be signed at the end thereof by the de	btor.
The following is a true list of all books, papers, deeds, and we trade, business, dealings, estate, and effects, or any part date of this petition, are in my possession or under me or which are in the possession or custody of any period of the property o	ritings relating to me thereof, which, at the content of the conte
Books.  Journal, ledger, cash book, and bank book.	
Deeds.  Deed to lots — and — subdivision.	,
2 deeds for —— acre tract N. E. 1/4 sect. —— T—	— R——. None.
A. B.	

#### OATH TO SCHEDULE B.

United States of America, District of —, ss.
On this — day of —, A. D. 18—, before me personally came —
—, the person mentioned in and who subscribed to the foregoing schedule, and who, being by me first duly sworn, did declare the said schedule to be a statement of all his estate, both real and personal, in accordance with the acts of Congress relating to bankruptcy.

(1) Loveland's Bank. secs. 60 and 81. Gen. Ord. 38; Mahoney vs. Ward, 100 Fed. Rep. 278, 3 Am. B. R. 770.

Schedules should not be filed with judge or referee but with the clerk. In re Sykes, 106 Fed. Rep. 669.

# SUMMARY OF DEBTS AND ASSETS.

[From the statement of the bankrupt in Schedules A and B.]

				_
Schedule	Α	1 (1)	Taxes and debts due United	
**	"	I (2)	Taxes due states, counties, dis-	
	"	T (a)	tricts, and municipalities	
46	"	I (3)	WagesOther debts preferred by law	
Schedule	Α	2 (4)	Secured claims	
Schedule			Unsecured claims	
Schedule			Notes and bills which ought to	
			be paid by other parties thereto.	
Schedule	A	5	Accommodation paper	
		ļ	Schedule A, total	
Schedule	В	τ	Real estate	=:
Schedule	В	2-a	Cash on hand	
"	"	2-b	Bills, promissory notes, and se-	
"	"		curities	
**	"…	2-c	Stock in trade	
"	"	2-d 2-e	Books, prints, and pictures	
"	"	2-f	Horses, cows, and other animals.	
66 3	"	2-g	Carriages and other vehicles	
**		2-h	Farming stock and implements	
"	<i></i>	2-i	Shipping and shares in vessels	
"		2-k	Machinery, tools, etc	
		2-1	Patents, copyrights, and trade-	
"	u	2-m	marks	
Schedule	В	2-111	Other personal property  Debts due on open accounts	
"	"	3-h	Stocks, negotiable bonds, etc	
"		. 3-c	Policies of insurance	
**		3-d	Unliquidated claims	
"		. з-е	Deposits of money in banks and	
	_	1	elsewhere	
Schedule	В	. 4	Property in reversion, remainder,	
Schedule	. 10	1-	Property claimed to be excepted.	
Schedule	: Б В В	.   5	Books, deeds, and papers	
Denegale		. 10	Schedule B, total	_

#### No. 4.

# Partnership Petition

(Official Form No. 2.)

To the Honorable ——, Judge of the District Court of the United States for the —— District of ——:

The petition of —— respectfully represents:

That your petitioners and —— have been partners under the firm name of ——, having their principal place of business at ——, in the county of ——, and district and state of ——, for the greater portion of the six months next immediately preceding the filing of this petition; that the said partners owe debts which they are unable to pay in full; that your petitioners are willing to surrender all their property for the benefit of their creditors, except such as is exempt by law, and desire to obtain the benefit of the acts of Congress relating to bank-ruptcy.

That the schedule hereto annexed, marked A, and verified by —— oath, contains a full and true statement of all the debts of said partners, and, as far as possible, the names and places of residence of their creditors, and such further statements concerning said debts as are required by the provisions of said acts.

That the schedule hereto annexed, marked B, verified by — oath, contains an accurate inventory of all the property, real and personal, of said partners, and such further statements concerning said property as are required by the provisions of said acts.

And said —— further states that the schedule hereto answed, marked C, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked D, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and

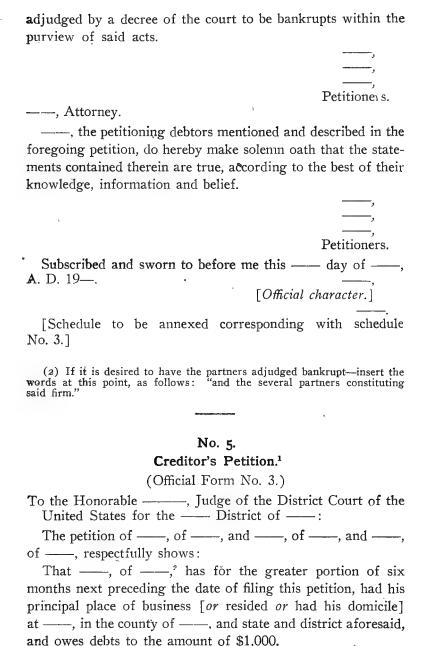
such further statements concerning said property as are required by the provisions of said acts.

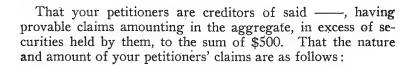
And said — further states that the schedule hereto annexed, marked E, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked F, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said — further states that the schedule hereto annexed, marked G, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked H, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said —— further states that the schedule hereto annexed, marked J, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked K, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

Wherefore your petitioners pray that the said firm 1 may be





And your petitioners further represent that said —— is insolvent, and that within four months next preceding the date of this petition the said —— committed an act of bankruptcy. in that he did heretofore, to-wit, on the —— day of

Wherefore your petitioners pray that service of this petition, with a subpœna, may be made upon ----, as provided in the acts of Congress relating to bankruptcy, and that he may be adjudged by the court to be a bankrupt within the purview of said acts.

Petitioners.

——, Attorney.

United States of America, District of —, ss.

---, being three of the petitioners above named, do hereby make solemn oath that the statements contained in the foregoing petition subscribed by them are true.

Before me, —, this — day of —, 189—.

[Official character.]

[Schedules to be annexed (filed by bankrupt) corresponding with schedule No. 3.1

(1) Sec. 181 et seq. Gen. Ords. 5 and 7.

(2) In case the debtor is an individual the following words should be inserted at this point: "is not a wage earner or engaged chiefly in farming or the tillage of the soil, but is a person subject to be adjudged a bankrupt upon a creditors' petition."

In case the debtor is a corporation the following words should be

In case the debtor is a corporation the following words should be inserted at this point: "is a corporation existing under the laws of the state of ——, and not a municipal, railroad, insurance or a banking corporation," See Sec. 4b, the bankrupt act as amended by the act of June 25, 1910, 36 Stat. at L. 838.

#### No. 6.

# Affidavit by Attorneys to Creditor's Petition.

United States of America, Southern District of New York, City, County and State of New York, ss.

On this 14th day of November, 1901, before me personally appeared Charles M. Leslie and John Ledyard Lincoln, who severally made solemn oath that they are attorneys and counselors-at-law of the Supreme Court of the state of Ohio and of the District, Circuit and Circuit Court of Appeals of the Southern District of Ohio, and that said John Ledyard Lincoln is a counselor-at-law admitted to practice in the Supreme Court of the United States, and that they are the attorneys and agents of the said petitioners in all matters recited in and relating to the said petition; that they have read the foregoing petition and know the contents thereof, and that the facts stated therein are true; that their sources of information and the grounds of their belief are among other things, examination of the original notes recited in the said petition; examination of the books of the said The Chequasset Lumber Company now in the possession of the said receiver, Eugene F. Perry, at 66 Broadway, in the city, county and state of New York; statements made to them by the officers of the said petitioning banks and by the said receiver; that the reason this affidavit is made by the said Leslie and Lincoln is that each of the said petitioners is a corporation organized under the laws of the United States, having its only office and place of business in Cincinnati, Ohio, more than 100 miles from the city of New York, and having no officer within this judicial district; and

that they have full authority from the said petitioning banks and have been authorized by them to make this affidavit.

Charles M. Leslie. John Ledyard Lincoln.

Sworn to before me this 14th day of November, 1901. [Seal.] John A. Valentine,

Notary Public, Kings Co.

Certificate filed in N. Y. County.

United States of America, Southern District of New York, City, County and State of New York, ss.

On this 14th day of November, 1901, before me personally appeared Henry Melville, who made solemn oath that he is an attorney-at-law duly admitted to practice in the District Court of the United States for the Southern District of New York. and the attorney of record of the foregoing petitioning creditors; that he has read the foregoing petition in bankruptcy and knows the contents thereof, and that the facts stated therein are true; that the sources of his information as to the truth of said facts are the statements made to him by Charles M. Leslie and John Ledyard Lincoln, attorneys and counselorsat-law, residing in the city of Cincinnati and state of Ohio, attorneys and general counsel for the said petitioners; that the said statements have been made under oath, as appears by the foregoing affidavits and otherwise; that the reason this verification is not made by the petitioners is that each of the petitioners is a corporation organized under the laws of the United States, having its principal and only place of business in Cincinnati, Ohio, more than one hundred miles from the city of New York, and having no officer within this judicial district; and that the deponent has been duly authorized to make this Henry Melville. verification.

Sworn to before me this 14th day of November, 1901. [Seal.] John A. Valentine,

Notary Public, Kings Co.

Certificate filed in N. Y. County.

(1) This affidavit was held sufficient in re Chequasset Lumber Co., 7 Am. B. R. 87.

That an attorney may make affidavit when familiar with the facts, see also in re Nelson, 98 Fed. Rep. 76; Leidigh Carriage Co. vs. Stengel, 95 Fed. Rep. 637; 2 Am. B. R. 283; Green River Deposit Bank vs. Craig Bros., 6 Am. B. R. 381.

# No. 7.

# Order to Show Cause upon Creditors' Petition.

(Official Form No. 4.)

In the District Court of the United States
For the — District of —.

In the matter of
In Bankruptcy.

Upon consideration of the petition of — that — be declared a bankrupt, it is ordered that the said — do appear at this court, as a court of bankruptcy, to be holden at —, in the district aforesaid, on the — day of —, at — o'clock in the — noon, and show cause, if any there be, why the prayer of said petition should not be granted; and

It is further ordered that a copy of said petition, together with a writ of subpœna, be served on said ——, by delivering the same to him personally or by leaving the same at his last usual place of abode in said district, at least five days before the day aforesaid.

Witness the honorable ——, judge of the said court, and the seal thereof, at ——, in said district, on the —— day of ——, A. D. 190—.

[Seal of the court.] Clerk.

#### No. 8.

# Subpoena to Alleged Bankrupt (1).

(Official Form No. 5.)

United States of America, —— District of ——, in said district, greeting:

For certain causes offered before the District Court of the United States of America within and for the —— district of ——, as a court of bankruptcy, we command and strictly enjoin you, laying all other matters aside and notwithstanding any excuse, that you personally appear before our said District Court to be holden at ——, in said district, on the —— day of ——, A. D. 190—, —— to answer to a petition filed by —— in our said court, praying that you may be adjudged a bankrupt; and to do further and receive that which our said District Court shall consider in this behalf. And this you are in no wise to omit, under the pains and penalties of what may befall thereon.

Witness the honorable —, judge of said court, and the seal thereof, at —, this — day of —, A. D. 190—.

Clerk.

[Seal of the court.]

(1) See Gen. Ord. 3; R. S. secs. 911 and 912; B. A. 1898, sec. 180. Eq. Rule 13.

#### No. 9.

# Denial of Bankruptcy (1).

(Official Form No. 6.)

In the District Court of the United States

For the —— District of ——.

In the matter of In Bankruptcy.

At —, in said district, on the — day of —, A. D. 190—.

And now the said — appears and denies that he has committed the act of bankruptcy set forth in said petition, or that he is insolvent, and avers that he should not be declared bankrupt for any cause in said petition alleged; and this he prays may be inquired of by the court [or, he demands that the same may be inquired of by a jury].

Subscribed and sworn to before me this day of ——, A. D. 190—.

[Official character.]

(1) B. A. 1898, sec. 19; secs. 228 et seq. ante.

#### No. 10.

## Order for Jury Trial (1).

(Official Form No. 7.)

In the District Court of the United States

For the —— District of ——.

In the matter of \_\_\_\_\_\_ In Bankruptcy.

At —, in said district, on the — – day of —, 19—. Upon the demand in writing filed by —, alleged to be a bankrupt, that the fact of the commission by him of an act of bankruptcy, and the fact of his insolvency may be inquired of by a jury, it is ordered that said issue be submitted to a jury.

Clerk.

[Seal of the court.]

(1) B. A. 1898, sec. 19.

#### No. 11.

## Answer to Creditor's Petition (1).

The District Court of the United States for the —— District of ——.

In the matter of E. F. & Co., F. Brothers,

and N. & Co.,

Petitioners,

US.

A. B. & Company,

Respondents.

Joint plea of the defendant, A. B., C. B. and D. B., partners under the firm name and style of A. B. & Company.

The defendants, A. B., C. B. and D. B., partners under the firm name and style of A. B. & Company, by protestation, not confessing nor acknowledging all or any of the matters or things in the said petition of said petitioners mentioned and contained to be true, in such manner and form as the same are therein set forth and alleged, for plea to the whole of said petition:

These defendants say that said petitioners are not, nor is either of them, creditors or a creditor in the manner or form alleged in their said petition, of these defendants or their said firm, and that the alleged demands of said petitioners mentioned and referred to in their said petition, are not provable against defendants or their said firm as in petition alleged, nor do the alleged demands of said petitioners against defendants' firm amount to \$---, and that the petitioners, E. F. & Company, were not at the time of filing said petition herein, entitled to demand of defendants' firm for the alleged sale or delivery referred to in petition, the sum of \$---, nor any other sum on account of said alleged sale or delivery, nor is said sum of \$---, or any other sum for the alleged sale and delivery of said goods, due to said petitioners, E. F. & Company. That the petitioners, F. Bros., had no such demand as set forth in petition, nor had the demand amounting

to \$—, nor was that sum, or any other sum, due from defendants' firm to said F. Bros. for said goods, nor for the alleged sale or delivery referred to in petition by F. Bros. to defendants' firm. That the petitioners, N. & Company, had no such demand as set forth in said petition for any goods, wares or merchandise sold or delivered, amounting in the aggregate to \$—, or any other such sum due, owing or unpaid for any such sale or delivery of goods.

These defendants further say that heretofore, to wit, several months before this proceeding was instituted, to wit, on ---, an action in equity was instituted in the Circuit Court for the county of — and state of —, at —, in and by which the defendant, L. C., as trustee, was plaintiff, and these defendants and all creditors of these defendants and their said firm were defendants, in which said L. C. set forth the assignment for the benefit of creditors, and sued for a settlement of his trust as assignee thereunder, and that in that settlement suit all of the petitioners in this proceeding, long before the institution of this proceeding, were parties defendant, and entered their appearance and filed their claims therein, and have ever since such entry of their appearance been at all times and are now parties to said settlement suit in said Circuit Court of — county, —, therein suing and seeking in the state court to recover their proportion, as creditors of defendants' firm, of the assets of defendants' firm so assigned, which proportion would be the same proportion that they would obtain if said estate were distributed in bankruptcy in this court: they have never dismissed their proceeding in said court, but were, at the time of the institution of this proceeding, and still are, seeking to recover in said action their proportionate share of the proceeds of said estate as creditors thereof, and that before the service of process or any notice or information of this proceeding the defendant, L. C., as assignee of these defendants, under orders of the —— Circuit Court. which had jurisdiction of the estate, the parties and the action

at that time, paid into court into the hands of the receiver of the court, and deposited in court in said action, all of the funds in his hands, to wit, all of the proceeds of the estate of these defendants so assigned to him for the benefit of creditors, and all of said funds have been ever since and now are in said court in said action in the actual control and custody of the court for distribution therein, and but for the proceedings in this court would be ready now for prompt distribution among the creditors in the same proportion and in the same manner that they would be distributed here, without the extra costs of the proceedings in this court, and these defendants rely on and plead said other action, suit and proceeding in the Circuit Court of —— county, in the state of ——, in bar and estoppel of petitioners' claim herein, and as a good and valid defense to said proceeding.

These defendants further state that before the institution of this proceeding, there was an agreement and composition offered by defendants' said firm to their creditors, including the petitioners in this proceeding, at the rate of fifty cents on the dollar, which proposition was offered by defendants to petitioners and other creditors and accepted by petitioners, and almost all of the creditors of defendant, and that as between defendants' firm and petitioners, the original indebtedness and obligation was by said agreement of composition terminated, and the right of petitioners against said defendants' firm is no longer upon the original accounts, sale or delivery of goods and original indebtedness, but upon the contract or composition and compromise agreed upon between defendants' firm and said petitioners and other creditors of defendants' firm.

These defendants further say that this proceeding was not instituted, nor has it ever been prosecuted in good faith on behalf of the petitioners or any of them for the relief afforded by the National Bankruptcy Law of 1898, entitled "An Act to establish a uniform system of bankruptcy throughout the United States," but was instituted for sinister oppressive and

vicious purposes, this proceeding being part of a plan or scheme begun by petitioners in 1898 for the avowed purpose of forcing defendants and their said firm to pay said petitioners more than other parties claiming to be creditors of defendants' firm, were to receive any more than the assigned estate could pay.

These defendants further state that in December, ----, the defendant, L. C., as assignee of defendants' firm, filed said suit in the —— Circuit Court of the state of ——, asking as aforesaid, a settlement of his accounts and distribution of the proceeds of the assigned estate among the creditors of defendants' firm, without preference as provided by the laws of —, that the petitioners in this proceeding, as parties to said suit, joined therein and united in an order entered in that action, referring said action in the --- Circuit Court to the commissioner of said court as a Commissioner in Chancery to make a settlement of the accounts to said L. C., as assignee, and a distribution among the creditors; that excepting a few outstanding accounts of little or no value, all of the assets of defendants' said firm assigned to said L. C. have long since been converted into money and the proceeds paid into court as hereinbefore set forth, for distribution; that said court is now, and has been for some time, ready to distribute said fund ammong the creditors in the same proportion, and with the same respective legal rights as they would be distributed in this court, and in this proceeding, if the funds should be brought into this court, waiting only for the time for creditors to present their claims as required by law, to pass, which time expired —. That the proceedings herein were taken and the petition of petitioners herein filed long after said State Court had taken and exercised complete jurisdiction and control of the defendants' said firm and their said estate assigned to said L. C., and of the said assignment and all of the claims of all of the creditors of defendants' said firm, and of all the estate of defendants' said firm, and had all of the transactions, property and parties under its jurisdiction and control, and of all of the proceeds of all of its property in its possession, and was ready to distribute the proceeds and long after the assignee had paid the said proceeds into court in that proceeding, where the same now remains, and that neither these defendants nor said L. C., nor either of them, has or has ever had since the time of the filing of petition of petitioners herein, any possession or control of said estate, or any part thereof, or of the proceeds thereof, all of which matters and things these defendants do aver and plead to the petitioners' said petition, and humbly crave whether they shall make any further answer to the said petition.

And these defendants not waiving their said pleading, but relying thereon, for answer to the said bill and in support of said plea say that they and each of them know not and have not been informed save by said petitioners' said petition, and cannot set forth as to their belief or otherwise; that the petitioners were partners as set forth in petition, and they deny that the demands of petitioners set forth in petition were or are provable against defendants' firm in accordance with the provisions of the Act referred to in said petition, or at all; deny that the demands of petitioners against defendants' firm exceeded \$---, or any other sum above \$----, and deny that petitioners, or either of them, at the time of filing the petition in this proceeding, had any such claim or demand as set forth in petition, or any other claim or demand excepting a claim upon the contract and agreement between petitioners and defendants' firm, to compromise at fifty cents on the dollar. They deny that the defendant, L. C., had at the time of the filing the petition herein, or has now, the sum of \$---, or any other sum, realized from the said assigned estate or any proceeds of the said assigned estate.

These defendants, for further answer herein, state that they are advised and believed that neither the petitioners, nor either of them, nor any creditor of these defendants, desires the court to proceed further on said petition in involuntary bankruptcy; that no creditor has applied to the court for an adjudication in bankruptcy; that the matter was not brought to the court's attention by any creditor, but was brought to the court's attention without the intervention or desire or suggestion of any creditor by some one of the officers of the court, and not for the benefit of any creditor.

These defendants deny all and all manner of unlawful combination and confederacy wherewith they are by said petition charged, without this, that there is any other matter, cause or thing in said petition contained, material or necessary for these defendants to make answer unto and not herein or hereby well and sufficiently answered, confessed, traversed and avowed or deny, is true to the knowledge or belief of these defendants, all of which matters and things these defendants are ready and willing to aver, maintain and prove as this honorable court shall direct, and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

Y. & Y.,

Attorneys for Defendants.

State of ----, County of ----, ss.

A. B., makes solemn oath and says he is the above named defendant; so much of the foregoing answer as concerns my own acts and deeds is true to the best of my knowledge, and so much thereof as concerns the acts or deeds of any other person or persons I believe to be true.

A. B.

Sworn to before me this —— day of ——.

[Seal.] N. R., Notary Public, —— County, ——.

(1) See note to No. 9.

## No. 12.

# Petition of Administrator of Deceased Partner Asking Leave to Settle Partnership Affairs (1).

District Court of the United States, — District of —.

In re A. B. & Co.

To the Honorable E. S., Judge of the District Court of the United States for the —— District of ——.

The petition of the Memphis Trust Company, administrator of A. B., deceased.

Petitioner respectfully shows that it was appointed administrator of A. B., deceased, by the Probate Court of ——county, ——, at its August Term, ——. It files herewith certified copies of its letters of administration.

It shows further that the said A. B. was the senior member of said firm of A. B. & Co., referred to in the original petition herein. It shows further that the individual assets, real and personal, of the said A. B., deceased, together with the partnership assets of the said firm of A. B. & Co. will, as it verily believes, be more than sufficient to pay all of the individual debts of the said A. B., and the firm liabilities of A. B. & Co. It shows further that before the petition in bankruptcy was filed herein against the said C. B. and D. B., it had taken steps in the Chancery Court of —— county, ——, to have the partnership property and assets of said firm of A. B. & Co., administered by said Chancery Court. On its application said Chancery Court of —— county, ——, appointed a receiver for said partnership assets on the —— day of ——, and said receiver was in charge of said assets when the petition in bankruptcy was filed in this cause.

Petitioner now presents this petition to this honorable court for the purpose of showing that as administrator of said A. B., deceased, it does not consent if said C. B. and D. B. are adjudged bankrupts, that partnership property shall be administered in bankruptcy.

Petitioner shows further that at its instance and on its application said partnership business is now being settled through said receivership mentioned above as expeditiously as its nature will permit.

Petitioner now asks leave to file this petition herein, and thereby set up its right to settle said partnership business in the manner set forth above.

> Turley & Wright, Solicitors for Mem. Trust Co., Admr.

(1) Taken from the record in Vaccaro vs. Security Bank, 103 Fed. Rep. 436.

#### No. 13.

## Order Permitting Creditor to Join in Creditor's Petition.

[Caption.]

Be it remembered that this cause came on for hearing on this day upon the petition of the Security Bank of —— and other creditors of the said A. B. & Co., the exhibits to said petition and the proof, etc., when H. W., a citizen of ——, appeared by his counsel, and represented to the court that he is a creditor of said A. B. & Co. (his debt being evidenced by the promissory note of said firm of date February 20th, 1897, and due December 20th, 1897, and for the sum of \$—— with interest at six per cent. per annum from date), and asked that he be allowed to join in the petition filed herein for involuntary bankruptcy, and the court doth hereby order that the said H. W. be and he is hereby allowed to become a party of this proceeding and that his name be inserted in the original petition as one of the petitioning creditors. Done this —— day of ——, A. D. ——.

#### No. 14.

## Special Warrant to Marshal (1).

(Official Form No. 8.)

In the District Court of the United States

For the — District of —.

In the matter of

In Bankruptcy.

To the Marshal of said district or to either of his deputies, greeting:

Whereas a petition for adjudication of bankruptcy was, on the —— day of ——, A. D. 19—, filed against ——, of the county of —— and state of ——, in said district and said petition is still pending; and whereas it satisfactorily appears that said —— has committed an act of bankruptcy [or, has neglected, or, is neglecting, or, is about to so neglect his property that it has thereby deteriorated, or, is thereby deteriorating, or, is about thereby to deteriorate in value], you are therefore authorized and required to seize and take possession of all the estate, real and personal, of said ——, and of all his deeds, books of account and papers, and to hold and keep the same safely subject to the further order of the court.

Witness the honorable —, judge of the said court and the seal thereof, at —, in said district, on the — of —, A. D. 19—.

Clerk.

[Seal of the court.]

#### RETURN BY MARSHAL THEREON.

By virtue of the within warrant, I have taken possession of the estate of the within-named ——, and of all his deeds, books of account and papers which have come to my knowledge.

Marshal [or, Deputy Marshal.]

#### FEES AND EXPENSES.

		1	
I.	Service of warrant		
2.	Necessary travel, at the rate of six cents a mile each way		
3.	Actual expenses in custody of property and other serv-		
υ.	Actual expenses in custody of property and other services, as follows		
	[Here state the particulars.]		
		<u> </u>	

Marshal [or, Deputy Marshal].

District of —, A. D. 19—.

Personally appeared before me the said ——, and made oath that the above expenses returned by him have been actually incurred and paid by him, and are just and reasonable.

Referee in Bankruptcy.

(1) B. A. 1898, sec. 69 and sec. 3e.

#### No. 15.

## Bond of Petitioning Creditor (1).

(Official Form No. 9.)

Know all men by these presents: That we, —, as principal, and —, as sureties, are held and firmly bound unto —, in the full and just sum of — dollars, to be paid to the said —, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our

heirs,	${\tt executors}$	and	administrators,	jointly	and	severally	by
these	presents.						

Signed and sealed this — day of — A. D. 189—.

The condition of this obligation is such that whereas a petition in bankruptcy has been filed in the District Court of the United States for the —— District of ——, against the said ——, and the said —— has applied to that court for a warrant to the marshal of said district, directing him to seize and hold the property of said —— subject to the further orders of said District Court.

Now therefore if such a warrant shall issue for the seizure of said property and if the said —— shall indemnify the said —— for such damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained, then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in presence of		[Seal.]
		[Seal.]
		[Seal.]
Approved this —— day of ——, A. D.	190—.	
		<del>,</del> ( '
	District	Judge.
(1) B. A. 1808, sec. 3e.		

#### No. 16.

## Bond to Marshal (1).

(Official Form No. 10.)

Know all men by these presents: That we, —, as principal, and —, as sureties, are held and firmly bound unto —, marshal of the United States for the —— District of —, in the full and just sum of —— dollars, to be paid to the said ——, his executors, administrators or assigns, to

which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Signed and sealed this — day of —, A. D. 190—.

The condition of this obligation is such that whereas a petition in bankruptcy has been filed in the District Court of the United States for the —— District of ——, against the said ——, and the said court has issued a warrant to the marshal of the United States for said district, directing him to seize and hold property of the said ——, subject to the further order of the court, and the said property has been seized by said marshal as directed, and the said District Court, upon a petition of said ——, has ordered the said property to be released to him.

Now, therefore, if the said property shall be releasd accordingly to the said ——, and the said ——+, being adjudged a bankrupt, shall turn over said property or pay the value thereof in money to the trustee, then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in the presence of \_\_\_\_\_ [Seal.] \_\_\_\_ [Seal.] \_\_\_\_ [Seal.] Approved this \_\_\_\_ day of \_\_\_\_, A. D. 19\_\_. \_\_\_\_, District Judge.

#### No. 17.

Petition to Enjoin Bankrupt or His Agent from Disposing of Property of the Estate.

In the District Court of the United States for the —— District of ——.

In the matter of E. B., bankrupt. In bankruptcy.

Respectfully represents E. M., trustee of the bankrupt herein, that as shown by the testimony in this case the said bankrupt

pretends that the \$---, being the proceeds of the sale of the stock of goods and the mortgage upon the real estate on Third Street, in —, is in the possession of his son, F. B.; that as shown by the record in this cause an order was entered requiring the said F. B. to appear before the referee herein and testify concerning the estate herein, and that said order has been returned "not found," and that a second order to such effect for his appearance has been entered and the same is now in the hands of the officers for execution. He says that the said F. B. so conceals his whereabouts that it is impossible for this petitioner, and, as he is informed, for the marshal of this court having said second order for execution, to learn of his said whereabouts; that petitioner is informed that there are persons offering to divulge the whereabouts of the said F. B. so that said order can be executed, upon the payment of the sum of \$50.00.

He further reports that as shown by the evidence herein the said F. B. was authorized by the bankrupt herein to receive the said fund of \$——, and that while said bankrupt pretends that he requested the payment of said money by said F. B. to said bankrupt he has made no effort to get said money and put it into the hands of this petitioner either as receiver of this court or as trustee, and that, notwithstanding that said bankrupt further pretends that he and his son were proposing to use said money to settle with the creditors and start another business elsewhere; and petitioner further reports that notwithstanding the said F. B. was present in —— up to the time of the proceeding in bankruptcy herein, he immediately thereon or immediately thereafter concealed his whereabouts from this petitioner and has kept them so concealed since that time.

Petitioner further refers to the record herein as to the order entered herein on the —— day of ——, A. D. ——, directing the said E. B. to pay said sum of money to this petitioner on or before the —— day of ——, and though petitioner says that he does not know whether said money is in the hands of said E. B. or under his control or in the hands of the said F. B.,

or under his control, he is fearful that said fund will be dissipated, and that said order may not be wholly effectual unless an injunction or restraining order be entered herein enjoining or restraining the said F. B. from disposing of any part of said funds and further ordering him to pay said fund into the hands of this petitioner. Petitioner says that from the evidence in this case already taken it appears, and petitioner believes, that the said sum of \$\\_\_\_\_ is a part of the estate and property of the bankrupt herein; that the same did not come into the hands of the said F. B., if at all, as a common or simple debtor, and that he does not occupy that relation to this estate, but that said sum is a fund belonging to this estate and should be in the hands of this petitioner.

The premises considered, he prays for instruction as to the said matter as herein set up concerning the payment of the said sum of \$50.00 as an aid to ascertain the whereabouts of the said F. B.; he prays for an order enjoining and restraining the said F. B. from disposing of the said money or any part thereof and further ordering and directing him to pay all, or so much thereof as he may have in his hands into the hands of this petitioner.

X. & X.,

Attorneys for Trustee.

E. M. says that he is trustee of the estate of the bankrupt herein, and that the statements contained in the foregoing petition are true, as he believes.

E. M.

Subscribed and sworn to before me by E. M., this —— day of ——, A. D. ——. W. W., Notary Public, Within and for County of ———. State of ——.

(\*) Taken from the record in Mueller vs. Nugent, 184 U. S. 1.

#### No. 18.

## Motion for Injunction.

In the District Court of the United States,

For the —— District of ——

In the matter of A. B., Bankrupt No. —— in bankruptcy.

At —, in said District, on the —— day of —— A. D. . 190—, —— District of ——, ss.

R. X. Esq., attorney for petitioning creditors [or as may be] moves the court for a writ of injunction against E. F., G. H. and J. K. according to the prayer of petition filed by R. S., E. T. and G. W. in this matter.

R. X.

Attorney for [as may be.]

## No. 19.

## Temporary Restraining Order. (1)

[Caption.]

And now, this — day of — 190—, on motion of said attorney, it appearing to the court that notice of this motion has been duly given to the proper parties, viz., E. F., G. H. and J. K. and that there is danger of irreparable injury to the creditors of the said debtor, unless the act sought to be enjoined is at once restrained, it is ordered that the above motion be heard at a session of said court, to be held at ——, on the —— day of —— A. D. 190—, at 10 a. m.; and it is further ordered that, until the decision of this court upon the said motion, the said parties against whom an injunction is prayed be restrained, and they are hereby commanded, under such penalties as are inflicted by the laws of the United States, to abstain from any and all interference, by execution, levy, sale, or in any other manner whatever, with the property or estate of the above named debtor.

<sup>(1)</sup> B. A. 1898, sec. 2, clause 15; sec. 718, R. S.

#### No. 20.

## Petition to Stay Pending Suit.1

In the District Court of the United States
For the —— District of ——.

In re A B., ) Bankrupt
Your petitioner, A M, respectfully shows that A B was duly
adjudicated a bankrupt herein on the — day of —— 19—
upon a petition filed the — day of —, 19—, and your
petitioner A M was on the — day of — appointed and
duly qualified as trustee of the estate of the said A B in bank
ruptcy, and is now acting as the said trustee.
That among the debts scheduled by said bankrupt proceedings
is one for — dollars (\$——), due C D and that such debt
is of such a nature as to be released by a discharge in bankruptcy.
That at the time of the filing of the petition, on which said
adjudication was made a suit was pending in the court of
- entitled C D vs. A B, founded upon the debt aforesaid
from which a discharge in bankruptcy would be a release, and
that the suit is still pending therein, and that if such suit is not
stayed, great injury will be done your petitioner and the estate
of A B to be administered in bankruptcy herein.
Wherefore your petitioner prays that further proceedings in
said suit may be stayed pursuant to the bankruptcy laws of the
United States in such cases made and provided, and that an
injunction may be issued out of this Honorable Court directed
to the said C D, restraining him, his agents, servants, attorneys
and counselors from further prosecuting said suit in said court
and for such other and further relief as to the court may seem
just. A. M.,
Trustee Petitioner.
State of————————————————————————————————————
I, A M, the petitioner mentioned in the foregoing petition, do
hereby make solemn oath that the statements of fact contained
therein are true to the best of my knowledge, information and
belief. A. M.
Subscribed and sworn to before me this —— day of —— 19—
J. N.
Notary Public in and for said County and State.

<sup>1</sup>This petition may be used with slight changes for stay prior to an adjudication. The bankrupt or the petitioning creditors may apply for a stay if no trustee has been appointed.

#### No. 21.

## Injunction to Stay Suit.

The United States of America, —— District of —— —— Division ss.

The President of the United States of America, to R. S. and S. T., greeting:

Whereas, a petition has been filed on the bankruptcy side of the District Court of the United States for —— Division of the ——District of ——, praying for an injunction to restrain the prosecution of a certain suit pending in the —— court in the county of —— state of —— in which you are plaintiffs and A. B. bankrupt is defendant, and has obtained an allowance for an injunction, as prayed for in said petition, from the District Court of the United States for the ——District of ——.

Now, therefore, we, having regard to the matters in said petition contained, do hereby command and strictly enjoin you, the said R. S. and S. T., or either of you, and each of your agents, servants, attorneys or counsellors, from further prosecuting said suit in said court, and from taking any further steps or proceeding in said action or suit now pending, as aforesaid, which commands and injunction you are respectively required to observe and obey until twelve months after the ——— day of ————, the date the said A. B. was adjudged a bankrupt, or if within that time the said A. B. applies for a discharge, then until the question of such discharge is determined, or until our said District Court shall make further order in the premises.

Hereof fail not, under the penalty of the law thence ensuing.

Witness, the Honorable G. R., District Judge of the United States for the —— District of ——, this —— day of —— A. D., 19—, and in the —— year of the independence of the United States of America.

B. R., Clerk of said Court.

[SEAL.]

#### No. 22.

## Order Denying Preliminary Injunction Against Execution Creditors.

[Caption.]

Ordered that the application of the trustee for a preliminary injunction against the E. F. Company and C. & D., restraining them from proceeding with their executions against the bankrupt's wife, be denied and the petition filed ——, in that behalf be dismissed, also that the sheriff be directed to pay the money in his hands to the plaintiffs in the executions, as if the proceedings here had not been taken. But this order is without prejudice to the trustee to proceed at law or in equity in any court of competent jurisdiction to recover the money from the execution creditors aforesaid, as he may be advised.

The complainant herein will pay the costs of this cause, for which execution is hereby awarded against him, and K. D., surety on his cost bond herein.

#### No. 23.

## Petition for the Appointment of a Receiver.

[Caption.]

Respectfully show, American Cutlery Co., A. M., engaged in business under the name and style of W. & Co. H. L., and R. Foundry Co., that heretofore, to wit, on the —— day of ——, ——, your petitioners filed an involuntary petition in bankrupt-cy against the A. B. Co., to which petition reference is here made for the specific allegations thereof. That the estate of said The A. B. Co., consisting of goods, wares and merchandise, accounts, etc., have been set over, transferred and delivered to the assignee, C. W., with general authority to sell and dispose of the same, and that furthermore certain creditors of

Wherefore, your petitioners pray that a temporary receiver to take charge of said estate, until a trustee can be elected, be at once appointed by your honor, and be empowered to take charge of and impound all of the property of said The A. B. Co. and hold the same subject to the further orders of this court.

American Cutlery Co., W. & Co., H. L., R. Fdy. Co., By R. X.,

Their Attorney.

#### No. 24.

## Order Refusing to Appoint a Receiver.

[Caption.]

And on the —— day of ——, came the parties, by their attorneys. The court being now fully advised of the petitioners' motion for the appointment of a receiver herein, it is therefore considered by the court that the said motion be, and the same is hereby, overruled.

#### No. 25.

## Order Appointing a Receiver in Bankruptcy

The District Court of the United States,

— District of — In bankruptcy.

In the matter of the petition of A. B. & Company and others to have The F. Company declared bankrupt.

This cause coming on to be heard upon the petition of A. B. & Company a creditor, to have a receiver appointed for said alleged bankrupt The F. Company, and due notice having been served of this application, and it appearing to the court that it is absolutely necessary for the preservation of the estate of said alleged bankrupt that a receiver be forthwith appointed, to take charge of, hold, manage and conduct the estate, property and assets of said alleged bankrupt;

It is therefore ordered, adjudged and decreed that W. R. be and he is hereby appointed receiver of all the assets and property of every kind and character of and belonging to the said F. Company, and said receiver is hereby clothed with all the power and authority of receivers in bankruptcy in like cases.

It is further ordered that said receiver within three days from this date, file a bond as such receiver, in the usual form, in the penal sum of \$\\_\_\_ with surety to be approved by the clerk of this court.

It is further ordered that said receiver continue and conduct the business of said alleged bankrupt until the further order of this court, and said receiver is hereby authorized and directed to employ any and all necessary help, including counsel, in the administration of his trust, therefore personally came the said W. R. and qualified as such receiver.

#### No. 26.

#### Order to Put Receiver in Possession.

[Caption.]

It appearing to the referee from the petition of J. M., receiver, filed herein on the —— day of ——, that he, the said J. M., as receiver, acting under an order of this referee, acting in the absence of the judge of this court from the — Division of the — District of —, lawfully proceeded to take charge of all of the properties of the defendant, A. B. Co., in the possession of C. W., assignee, under authority and power contained in said order of appointment, and it further appearing to the referee that the said C. W. has refused to surrender the possession thereof to the said J. M., receiver, who is an officer of this court under appointment of date —, and that the said C. W. has openly, defiantly and in disobedience of an order of this court refused to set over and surrender to the said J. M. the moneys and other properties belonging to the defendant company and in his possession, and unlawfully withholds the same from the said receiver, it is, therefore, ordered that the marshal of the United States for the --- Division of the — District of —, proceed at once to take charge of and seize all of the properties of the defendant, The A. B. Co., of whatsoever kind and description in the possession of C. W., assignee, or his agents, or the agents or employes of the said A. B. Company, and put the said J. M., receiver, in lawful and peaceable possession thereof, and the said marshal will carry into effect this order and report his action to this referee. This —— day of ——.

R. D. Referee in Bankruptcy.

#### No. 27.

#### Marshal's Return on Above Order.

United States of America,

— District of —, ss.

Came to hand this the —— day of ——, and executed as therein commanded, by making known the contents of said writ, and receiving from the said C. W., assignee, the front door keys of the four story brick building, No. 401 Main St., and all contents therein of this date. Also front door keys to the four story brick building, No. 257 Main St., and all contents of said building of this date, and all keys and combinations to one large iron safe in building No. 401 Main St., ——. Also three checks amounting to sixteen and 40-100 dollars and cash \$9.06 (nine and 06-100) for which I gave the said C. W. a receipt, and for which a receipt was taken from the said J. M., receiver. Formal demand was also made upon the said C. W., assignee, for any and all cash belonging to the said A. B. Co. in his possession as assignee in any of the banks of ——, which demand was refused by the said C. W.

V. F.

United States Marshal.

#### No. 28.

## Adjudication that Debtor is not Bankrupt (1).

(Official Form No. 11.)

In the District Court of the United States
For the — District of —.

In the matter of
In Bankruptcy.

At ——, in said district, on —— day of ——, A. D. 19—, before the honorable ——, judge of the —— District of ——.

This cause came on to be heard at —, in said court, upon the petition of — that — be adjudged a bankrupt within the true intent and meaning of the acts of Congress relating to bankruptcy, and [here state the proceedings, whether there was no opposition, or, if opposed, state what proceedings were had].

And thereupon, and upon consideration of the proofs in said cause [and the arguments of counsel thereon, if any], it was found that the facts set forth in said petition were not proved; and it is therefore adjudged that said —— was not a bankrupt, and that said petition be dismissed with costs.

Witness the honorable ——, judge of said court, and the seal thereof, at ——, in said district, on the —— day of ——, A. D. 19—. ——, Clerk.

[Seal of the court.]

(1) B. A. 1898, sec. 18d and e.

## No. 29.

## Adjudication of Bankruptcy (1).

	(Official Form No. 12.)	
	urt of the United States District of ——.	
In the matter of Bankrupt	In Bankruptcy.	
19—, before the haruptcy, the petition within the true into lating to bankrupt the said —— is had cordingly.  Witness the home	id district, on the — day of nonorable —, judge of said on of — that — be adjudged tent and meaning of the acts of tcy, having been heard and duthereby declared and adjudged norable —, judge of said count said district, on the — day	court in bank- ed a bankrupt f Congress re elly considered bankrupt ac ert, and the sea ey of, A,
[Seal of the court	t.	Clerk.
(I) B. A. 1898, sec	c. 18 $d$ and $e$ .	

#### No. 30.

## Order of Adjudication and Designating Newspaper.1

In the District Court of the United States

and adjudged bankrupt accordingly.

—— District of ——	
In the matter of A. B., bankrupt.  No. ——	In Bankruptcy.
At —, in said district, on the —	' day of, 190—, be-
fore the said Court in Bankruptcy,	the petition of A. B. that
he be adjudged bankrupt within the	e true intent and meaning
of the acts of Congress relating to	bankruptcy, having been
heard and duly considered, the said	A. B. is hereby declared

It is further ordered that all notices required to be published in the above entitled matter, and all orders which the court may direct to be published, be inserted in —— a newspaper published in the —— County of ——, State of ——, within the territorial district of this court, and in the County within which said bankrupt resides.

Dated, — District Judge.

(1) The above form is used in some districts. In others a general designation of newspapers for each county is made which by its terms is applicable to all subsequent cases.

#### No. 31.

## Order of Reference (1).

(Official Form No. 14.)

In the District Court of the United States

For the —— District of ——.

In the matter of
Bankrupt.

Whereas, —, of —, in the county of —, and district aforesaid, on the —— day of —, A. D. 19.., was duly adjudged a bankrupt upon a petition filed in this court by [or, against] him on the —— day of —, A. D. 19—, according to the provisions of the acts of Congress relating to bankruptcy.

It is thereupon ordered that said matter be referred to ——, one of the referees in bankruptcy of this court, to take such further proceedings therein as are required by said acts; and that the said —— shall attend before said referee on the —— day of —— at ——, and thenceforth shall submit to such orders as may be made by said referee or by this court relating to said —— bankruptcy.

Witness the honorable ——, judge of the said court, and the seal thereof, at ——, in said district, on the —— day of ——, A. D. 190—.

Clerk.

[Seal of the court.]

(1) B. A. 1898, sec. 18d and e.

## No. 32.

## Order of Reference in Judge's Absence (1).

(Official Form No. 15.)
In the District Court of the United States  For the —— District of ——.
In the matter of In Bankruptcy.
Whereas, on the —— day of ——, A. D. 19—, a petition was filed to have ——, of ——, in the county of ——, and district aforesaid, adjudged a bankrupt according to the provisions of the acts of Congress relating to bankruptcy; and whereas, the judge of said court was absent from said district at the time of filing said petition [or, in case of involuntary bankruptcy, on the next day after the last day on which pleadings might have been filed, and none have been filed by the bankrupt or any of his creditors], it is thereupon ordered that the said mater be referred to ——, one of the referees in bankruptcy of this court, to consider said petition and take such proceedings therein as are required by said acts; and that the said —— shall attend before said referee on the —— day of ——, A. D. 19—, at ——.  Witness my hand and the seal of the said court, at ——, in said district, on the —— day of ——, A. D. 19—.
Clerk.

[Seal of the court.]

(1) B. A. 1898, sec. 18f and g; Gen. Ord. 12.

#### No. 33.

#### Referee's Oath of Office.

(Official Form No. 16.)

I, —, do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as referee in bankruptcy, according to the best of my abilities and understanding, agreeably to the constitution and laws of the United States. So help me God.

Subscribed and sworn to before me this —— day of ——,
A. D. 190—.

District Judge.

(1) B. A. 1898, sec. 36.

#### No. 34.

## Bond of Referee (1).

(Official Form No. 17.)

Know all men by these presents: That we, —, of —, as principal, and —, of —, and —, of —, as sureties, are held and firmly bound to the United States of America in the sum of —— dollars, lawful money of the United States, to be paid to the said United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Signed and sealed this —— day of ——, A. D. 19—.
The condition of this obligation is such that whereas the said —— has been, on the —— day of ——, A. D. 19—, appointed by the honorable ——, judge of the District Court of the

United States for the — District of —, a referee in bankruptcy in and for the county of -, in said district, under the acts of Congress relating to bankruptcy.

Now, therefore, if the said - shall well and faithfully discharge and perform all the duties pertaining to the said office of referee in bankruptcy, then this obligation to be void; otherwise to remain in full force and virtue.

Signed and sealed in the presence of \_\_\_\_ [Seal.] Approved this — day of —, A. D. 19—. District Judge. (1) B. A. 1898, sec. 50.

## No. 34a. Petition by Trustee to Recover a Preference.

(Style of Court.)

H. W., Trustee of the Estate of A. B., Bankrupt, Plaintiff, The C. D. Co., Defendant.

Plaintiff states that on the —— day of ——, 19—, a petition in bankruptcy was filed against A. B., in the District Court of the United States for the — Division of the — District of —, and that thereafter the said A. B. was duly adjudicated bankrupt, and that thereafter plaintiff was duly elected trustee of the estate of said bankrupt, and has duly qualified as such. That the defendant is and was at the time hereinafter mentioned, a corporation duly organized and existing under the laws of the — State of —.

For its cause of action plaintiff states, that within four months prior to the said petition in bankruptcy being filed,

namely, on or about the — day of —, 19—, the said A. B. was insolvent and was indebted to this defendant in the sum of \$---, and in payment of said indebtedness transferred to this defendant merchandise consisting of - of the reasonable value of \$---. That the effect of the transfer of said property was that this defendant obtained a greater percentage of its debt than any other creditor of said bankrupt of the same class. That defendant and its agents had reasonable grounds to believe at said time that it was intended by ( such transfer of property to give a preference to this defendant, within the meaning of the Acts of Congress relating to bankruptcy. That after this plaintiff had been elected trustee and had qualified, he notified said defendant that he avoided said transfer of property as a preference and he demanded of said defendant the return of said property, but that defendant refused and still refuses to return the same 2

Wherefore plaintiff prays judgment in the sum of \$---

and his costs.

H. W.. Trustee in Bankruptcy.

[Verification.]

(1) Taken from Pace v. Roberts et al Shoe Co., 103 Mo. App., 662, 665. If the petition is filed in a circuit court of the United States it should aver the amount in controversy and the citizenship of the bankrupt and the defendant. Bush v. Elliott, 202 U. S., 477.

(2) No previous demand is necessary. Kaufman v. Treadway, 195

U. S., 271.

## No. 34b.

## Intervening Petition of Vendee under Conditional Sale.1

In the District Court of the United States, --- District

In the Matter of the A. B. In Bankruptcy. Company.

Now comes the Y. Manufacturing Company, a corporation duly organized under the laws of the state of ----, and a citizen of ----, of such state, and leave having been first obtained to intervene in this cause, presents this its petition to this Honorable Court and says:

That your petitioner made a contract of sale with The A. B. Company, a corporation organized and existing under the laws of the State of —, or about September 30th, 19—, countersigned October 27th, 19—, by your petitioner. That a copy of this coutract marked Exhibit "A" is hereto attached and made a part hereof. That by the terms of this contract your petitioner was to erect upon the premises indicated by The A. B. Company a certain ice-making and refrigerating plant fully described in the contract annexed. That the price to be paid therefor was —— dollars, and that the title to, and right of property in, and ownership of said plant and machinery so furnished was to remain in your petitioner until the same was fully paid for in cash. That said plant and machinery was erected by your petitioner as agreed. That only twentyfive per cent. of the purchase price has ever been paid. That the remaining seventy-five per cent, of said contract price is due and unpaid, notwithstanding demand having been made therefor. That by reason of such defaults the right has accrued to your petitioner under said contract to enter upon the premises of The A. B. Company and remove and repossess itself of said plant and machinery.

That on or about the 11th day of December, 19—, this honorable court adjudged The A. B. Company a bankrupt, whereupon the said plant and machinery passed into the possession and control of this honorable court.

Wherefore your petitioner prays this honorable court for an order directing such officer of this honorable court as shall at the time of making such order be in possession thereof, to permit your petitioner to enter on the premises of said bankrupt and to afford your petitioner every facility to remove said bankrupt and machinery.

And your petitioner prays for all other and further relief to which it may be entitled.

> THE Y. MANUFACTURING COMPANY., By S. Y., Pres.

## [Verification.]

<sup>(1)</sup> This form is taken from the record in York Mfg. Co. v. Cassell, 201 U. S., 344, 50 L. Ed., 782, 15 Am. B. R., 639.
For another form see In re Hemstreet, 8 Am. B. R., 763.

## PROCEEDINGS BEFORE REFEREE.

No. 35.

## Notice of First Meeting of Creditors (1).

(Official Form No. 18.)

In the District Court of the United States

For the —— District of ——. In Bankruptcy.
In the matter of Bankrupt. Bankrupt.
To the creditors of —, of —, in the county of — and district aforesaid, a bankrupt:  Notice is hereby given that on the — day of —, A. D. 18—, the said — was duly adjudicated bankrupt; and that the first meeting of his creditors will be l.eld at —, in — on the — day of —, A. D. 19—, at — o'clock in the — noon, at which time the said creditors may attend, prove their claims, appoint a trustee, examine the bankrupt and transact such other business as may properly come before said meeting.
Referee in Bankruptcy.

(1) B. A. 1898, secs. 55 and 58b and c; Gen. Ord. 12.

#### No. 36.

# Affidavit in Proof of Publication of Notice of the First Creditors' Meeting.

— District of — Division—In bankruptcy.

The District Court of the United States

State of ——, County of ——, ss.

Personally appeared before me, a notary public, in and for
said County, E. S., for the publisher of The Court Index, who,
being duly sworn, says that the annexed advertisement was
published — times, on the —, 190—, and that said publi-
cation was made in The Court Index, a newspaper printed and
of general circulation in said county, and the paper duly desig-
nated by the District Court of the United States for - Dis-
trict of —, — Division, sitting as a Court of Bankruptcy,
for the publication of all notices required to be published
within the District of —— County, under the act of Congress,
approved July 1, 1898, entitled "An Act to Establish a Uni-
form System of Bankruptcy Throughout the United States."
E. S.
Sworn to before me, and signed in my presence, this ——
day of, 190
J. N.
Notary Public, within and for
· — County, ——.
<del>,</del> 190 <del></del> .
I hereby certify that this day I mailed a copy of the notice
above set forth to each of the creditors named in the schedules
filed herein. A. M.,
Referee in Bankruptcy.

## No. 37.

## Appointment, Oath, and Report of Appraisers (1).

(Official Form No. 13.)

	` '
	Court of the United States District of ——.
In the matter of Bankrupt.	In Bankruptcy.
of ——, three dis appointed appraise erty belonging to schedules now or praisal to the cour be, and the apprais	at —, of —, — of —, and —, interested persons, be, and they are hereby, ers to appraise the real and personal propthe estate of the said bankrupt set out in the file in this court, and report their apt, said appraisal to be made as soon as may sers to be duly sworn.  Indeed, A. D. 19—.
	Referee in Bankruptcy. —, ss. eared the within-named —, and severally will fully and fairly appraise the aforesaid
	property according to their best skill and
Subscribed and A. D. 19—.	sworn to before me this —— day of ——,  [Official character.]
,	gned, having been notified that we were ap-

We, the undersigned, having been notified that we were appointed to estimate and appraise the real and personal property aforesaid, have attended to the duties assigned us, and after a

strict examination and careful inquiry, we do appraise the same as follows:	estimate	e and
	Dollars.	Cents.
•	,	
In witness whereof we hereunto set our hands, —— day of ———, A. D. 19—.	at,	, this
(1) B. A. 1898, sec. 70b.	_	
No. 38.		
List of Debts Proved at First Meeting	ıg.	
(Official Form No. 19.)		
In the District Court of the United States  For the —— District of ——.		
In the matter of Bankrupt.  Bankrupt.		
At —, in said district, on the —— day of 19—, before ——, referee in bankruptcy.  The following is a list of creditors who have the their debts:	,	

Names of creditors.	Residence.	Debts 1	roved.
		Dolls.	Cts.

Referee in Bankruptcy.

#### No. 39.

#### General Letter of Attorney in Fact when Creditor is not Represented by Attorney at Law (1).

(Official Form No. 20.)

In the District Court of the United States

For the — District of —.

In the matter of Bankrupt.	In Bankruptcy.
To —,	

I, —, of —, in the county of —— and state of ——, do hereby authorize you, or any one of you, to attend the meeting or meetings of creditors of the bankrupt aforesaid at a court of bankruptcy, wherever advertised or directed to be holden, on the day and at the hour appointed and notified by said court in said matter, or at such other place and time as may be appointed by the court for holding such meeting or meetings, or at which such meeting or meetings, or any adjournment or adjournments thereof may be held. and then and

there from time to time, and as often as there may be occasion, for me and my name to vote for or against any proposal or resolution that may be then submitted under the acts of Congress relating to bankruptcy; and in the choice of trustee or trustees of the estate of the said bankrupt, and for me to assent to such appointment of trustee; and with like powers to attend and vote at any other meeting or meetings of creditors, or sitting or sittings of the court, which may be held therein for any of the purposes aforesaid; also to accept any composition proposed by said bankrupt in satisfaction of his debts, and to receive payment of dividends and of money due me under any composition, and for any other purpose in my interest whatsoever, with full power of substitution.

In witness whereof I have hereunto signed my name and affixed my seal the —— day of ——, A. D. 19—.

Signed, sealed and delivered in presence of

Acknowledged before me this — day of —, A. D. 19—.

[Official character.]

(1) When executed on behalf of a partnership or of a corporation the person executing the instrument must make oath that he is a member of the partnership, or a duly authorized officer of the corporation on whose behalf he acts. Gen. Ord. 21, par. 5.

#### No. 40.

## Special Letter of Attorney in Fact.

(Official Form No. 21.)

In the matter of
—— —
· Bankrupt.
To,
:
I hereby authorize you, or any one of you, to attend the meet
ing of creditors in this matter, advertised or directed to be hold
en at, on the day of, before, or any ad
journment thereof, and then and there for and i
name to vote for or against any proposal or resolution
that may be lawfully made or passed at such meeting or ad
journed meeting, and in the choice of trustee or trustees of th
estate of the said bankrupt.
In witness whereof I have hereunto signed my name and at

In witness whereof I have hereunto signed my name and affixed my seal the —— day of ——, A. D. 19—.

[Seal.]

Signed, sealed and delivered in presence of

Acknowledged before me this —— day of ——, A. D. 19—.

[Official character.]

See note to Form No. 39.

#### No. 41.

# Appointment of Trustee by Creditors. (1).

(Official Form No. 22.)

In the District Court of the United States

For the —— D	istrict of ——.	
,	n Bankruptcy.	
Bankrupt.		
19—, before ——, r This being the day ing of creditors in t notice has been given papers in which note hereunder written, be of claims of the cred have been allowed, a hereby appoint ——,	district, on the —— day of eferee in bankruptcy. I appointed by the court for the above bankruptcy, and in the [here insert the name lice was published], we, who sing the majority in number alitors of the said bankrupt, and who are present at this of ——, in the county of ——	the first meet- of which due as of the news- ose names are and in amount whose claims s meeting, do — and state
effects.	stee — of the said bankru	pr s estate and
Signatures of creditors.	Residences of the same.	Amount of debt.
		Dolls. Cts.
Ordered that the a	bove appointment of trustee	— be and the
same is hereby appro	$\mathbf{v}$ ed	

<sup>(1)</sup> B. A. 1898, sec. 44 and sec. 50c. No official or general trustee can be appointed by the court. Gen. Ord. 14.

#### No. 42.

# Appointment of Trustee by Referee. (1).

(Official Form No. 23.)

In the District Court of the United States

For the —— District of ——.

and state of —, as trustee of the same.

In the matter of	
	In Bankruptcy.
Bankrupt.	
	•
At ——, in said	l district, on the —— day of ——, A. D.
19—, before ——	, referee in bankruptcy.
This being the d	ay appointed by the court for the first meet-
ing of creditors ur	der the said bankruptcy and of which due
notice has been give	en in the [here insert the names of the news-
papers in which no	tice was published], I, the undersigned ref-
eree of the said con	art in bankruptcy, sat at the time and place
above mentioned, p	oursuant to such notice, to take the proof of

debts and for the choice of trustee under the said bankruptcy; and I do hereby certify that the creditors whose claims had been allowed and were present, or duly represented, failed to make choice of a trustee of said bankrupt's estate, and therefore I do hereby appoint —, of —, in the county of

<sup>(1)</sup> B. A. 1898, sec. 44. No general or official trustee can be appointed to act in cases generally. Gen. Ord. 14.

#### No. 43.

### Notice to Trustee of His Appointment (1).

(Official Form No. 24.)

	urt of the United States District of ——.
In the matter of Bankrupt.	In Bankruptcy.
said: I hereby notify y	in the county of ——, and district afore rou that you were duly appointed trustee [or

I hereby notify you that you were duly appointed trustee [or, one of the trustees] of the estate of the above-named bankrupt at the first meeting of the creditors, on the —— day of —— A. D. 19—, and I have approved said appointment. The penal sum of your bond as such trustee has been fixed at —— dollars. You are required to notify me forthwith of your acceptance or rejection of the trust.

Dated at ——, the —— day of ——, A. D. 19—.

<sup>(1)</sup> Gen. Ord. 16. The creditors fix the amount of the bond. B. A. 1898, sec. 50c.

## No. 44.

## Bond of Trustee. (1).

(Official Form No. 25.)

Know all men by these presents: That we,, of
, as principal, and, of, and, of
-, as sureties, are held and firmly bound unto the United
States of America in the sum of —— dollars, in lawful money
of the United States, to be paid to the said United States, for
which payment, well and truly to be made, we bind ourselves
and our heirs, executors and administrators, jointly and sev-
erally by these presents.
Signed and sealed this — day of —, A. D. 190—.
The condition of this obligation is such, that whereas the
above-named was, on the day of, A. D.
190-, appointed trustee in the case pending in bankruptcy
in said court, wherein is the bankrupt, and he, the
said, has accepted said trust with all the duties
and obligations pertaining thereunto:
Now, therefore, if the said ——, trustee as aforesaid,
shall obey such orders as said court may make in relation to
said trust, and shall faithfully and truly account for all the
moneys, assets and effects of the estate of said bankrupt which
shall come into his hands and possession, and shall in all re-
spects faithfully perform all his official duties as said trustee,
then this obligation to be void; otherwise, to remain in full
force and virtue.
Signed and sealed in
presence of
[Seal.]
[Seal.]
[Seal.]
,

<sup>(1)</sup> B. A. 1898, secs. 50b and c.

#### No. 45.

### Order Approving, Trustee's Bond.

(Official Form No. 26.)

At a court of bankruptcy, held in and for the —— District

of —, at —, —, this — day of —, 190.—.  Before —, referee in bankruptcy, in the District
Court of the United States for the — District of —.
In the matter of Bankrupt.  Bankrupt.
It appearing to the court ————, of ———, and in said district, has been duly appointed trustee of the estate of the above-named bankrupt, and has given a bond with sureties for faithful performance of his official duties, in the amount fixed by the creditors [or, by order of the court], to wit, in the sum of ———— dollars, it is ordered that the said bond be and the same is hereby approved.  Referee in Bankruptcy.
No. 1156.
Order that no Trustee be Appointed. (1).
(Official Form No. 27.)

In the District Court of the United States for the —— District of ——.

In the matter of
Bankrupt.
Bankrupt.

It appearing that the schedule of the bankrupt discloses no

assets, and that no creditor has appeared at the first meeting, and that the appointment of a trustee of the bankrupt's estate is not now desirable, it is hereby ordered that, until further order of the court, no trustee be appointed and no other meeting of the creditors be called.

Referee in Bankruptcy.

(1) Gen. Ord. 15.

#### No. 47.

## Order for Examination of Bankrupt. (1).

(Official Form No. 28.)

In the District Court of the United States for the —— District of ——.

In the matter of
Bankrupt.

In Bankruptcy.

At —, on the — day of —, A. D. 19—.

Upon the application of ——, trustee of said bankrupt [or, creditor of said bankrupt], it is ordered that said bankrupt attend before ——, one of the referees in bankruptcy of this court, at ——, on the —— day of ——, at — o clock in the ——noon, to submit to examination under the Acts of Congress relating to bankruptcy, and that a copy of this order be delivered to him, the said bankrupt, forthwith.

Referee in Bankruptcy.

(1) B. A. 1898, sec. 7, clause 9; sec. 21, and sec. 38, clause 2. Gen. Ord. 22. See also note to No. 48.

In the matter of

Bankrupt.

#### No. 48.

## Examination of Bankrupt or Witness. (1).

(Official Form No. 29.)

In the District Court of the United States for the —— Dis-

trict of ——.

In Bankruptcy.

At —, in said district, on the — day of —, A. D.
19—, before ——, one of the referees in bankruptcy of said
court.
, of, in the county of, and state of,
being duly sworn and examined at the time and place above
mentioned, upon his oath says [here insert substance of exam-
ination of party]. —,
Referee in Bankruptcy.
(1) B. A. 1898, sec. 21. Gen. Ord. 22.
No. 49.
Summons to Witness (1).
(Official Form No. 30.)
To —:
Whereas, —, of —, in the county of —, and state of
-, has been duly adjudged bankrupt, and the proceeding
in bankruptcy is pending in the District Court of the United
States for the —— district of ——.
These are to require you, to whom this summons is directed,
personally to be and appear before —, one of the referees in
bankruptcy of the said court, at, on the day of
at —— o'clock in the ——noon, then and there to be examined
in relation to said bankruptcy.
Witness the Hon. —, judge of said court, and the seal
thereof at —, this — day of —, A. D. 19—.

## RETURN OF SUMMONS TO WITNESS.

In the District Court of the United States for the —— District of ——.
In the matter of Bankrupt.  Bankrupt.
On this — day of —, A. D. 19—, before me came —, of —, in the county of —, and state of —, and makes oath, and says that he did, on —, the — day of —, A. D. 19—, personally serve —, of —, in the county of —, and state of —, with a true copy of the summons hereto annexed, by delivering the same to him; and he further makes oath, and says that he is not interested in the proceeding in bankruptcy named in said summons.  Subscribed and sworn to before me this — day of —, A. D. 19—.
(1) Gen. Ord. 3. R. S. sec. 911, et seq.
No. 50.
Minutes of Creditors' Meeting (1).
The District Court of the United States  For the —— District of —— In the matter of N. W., bankrupt.  Before A. M., referee, on the —— day of ——, 19—, at —— o'clock. Present: The referee, bankrupt and various attorneys for creditors, and also creditors.  The motion of the B. Mfg. Co., filed on the —— day of ——

19—, coming on for hearing, I heard evidence in relation to the same, and ordered as follows, viz.:

I ordered and directed the trustee to pay over to W. K., attorney for the B. Mfg. Co., the sum of \$—— being \$—— less ten per cent. the amount of merchandise belonging to said company and held on consignment by the bankrupt and since sold by the receiver herein and realizing said sum; I finding the said amount to belong to the said company, I also ordered and directed the trustee to turn over to said company all the —— now on hand, or that may hereafter come to the trustee's hands, the same being the property of said company and never sold by them. I also found that the said company has a claim as per schedule, for \$—— goods sold up to the —— day of ——, 19—, the same being a general claim. I also found that the said company has an additional claim for the sum of \$—— goods sold from the —— day of ——, 19—, up to the date of assignment, the same being a general claim.

The attorney for the C. B. Association, mortgagee consenting, I directed the trustee to commence proceedings for the sale of real estate under mortgage in the District Court of the United States, said mortgagee agreeing to enter its appearance and consent to jurisdiction. And I directed the same proceedings to be brought in relation to the other mortgaged real estate, in the event similar consent of mortgagee can be secured.

The bill of the heirs of G. W. for rent from the —— day of ——, 19—, to the —— day of —— 19—, amounting to \$—— being presented as a claim entitled to preference on the ground of expense incurred by the assignee and trustee, and it appearing that possession was not taken until the —— day of ——, 19—, I accordingly reduced said claim to \$——, which sum I directed the trustee to pay as a preferred claim.

The matter of disposition of the assigned bankrupt's stock of merchandise, etc., being heard, on motion of the creditors the trustee herein was directed to sell the same at private sale at not less than —— per cent. of the appraised value, and was

also authorized to employ a man to assist in said work at not exceeding \$\_\_\_\_ a week,

The bankrupt stated that his wife withdraws all claims herein, and that she would not file any claim herein.

The application of F. Q., for the payment of the proceeds of —— bales out of —— bales of ——, sent to the bankrupt on consignment, was heard, and it appearing that said goods were on consignment and that —— bales have been sold by the trustee herein as receiver herein, for the sum of \$——, it is ordered that said sum less —— per cent. the usual commission, to wit the sum of \$—— be paid to said F. Q. as a preferred claim herein.

It also appearing that the trustee herein has in his possession—bales of spoiled—sent by F. Q. to the bankrupt on consignment, and which property was not appraised herein or included in the appraisement, I ordered that the trustee deliver said property to the said F. Q.

The application of the appraisers for \$—— compensation each, was rejected by me as excessive charges, and on motion of the creditors and with their consent, I directed the trustee to pay to each of the appraisers herein the sum of \$——.

In relation to the disposition of the bank stock and the B.' Brewing Co. bonds, the trustee was directed to get offers for the purchase of the same, and report to the referee.

In relation to policy No. — N. Y. L. Insurance Company, the trustee was directed to inquire into its value of the company, and report to the referee.

The trustee was ordered to collect from E. T., assignee, the sum of \$——, collected by the said assignee.

The trustee was directed to pay all tax bills and delinquent taxes on real or personal property.

The trustee was directed to sell the real estate at —, for not less than — per cent. of its appraised value.

The bankrupt was examined and further examination continued until —— day of ——, 19—, at — o'clock, and the trustees authorized to employ an accountant to furnish to the court

and creditors information of payments made by the bankrupt within the past four months preceding his assignment.

(1) Taken from the record in re Nicholas Wolff, pending in the District Court of the United States for the Southern District of Ohio.

#### No. 51.

### Order that Bankrupt Deliver Assets to Trustee (1).

### [Caption.]

This cause having been referred to the undersigned A. M., as referee, after an examination of said bankrupt and evidence having been fully had before said referee in accordance with the statutes in such cases made and provided, the evidence having been submitted upon argument, the undersigned referee does hereby make the following order on said A. B., bankrupt:

First. That said bankrupt A. B., within twenty days from and after the service of a copy of this order having been made, pay to B. M. Esq., trustee, the sum of \$——, and deliver to said trustee, United States three per cent. coupon bonds of the face value of \$——, or \$—— in money.

Second. That in the event of the said A. B. failing or neglecting to obey this order to pay to the said trustee the above amount and deliver said bonds or money, the said B. M., as such trustee, is hereby ordered and directed to institute proceedings against the above named A. B. in accordance with the provisions of Section 29 of the Bankrupt Act of 1898, and

It is further ordered that a copy of this order be served personally upon the said A. B., the said bankrupt, and by mail upon R. X. Esq., attorney for the bankrupt, and on B. M. Esq., said trustee.

Dated at —— this —— day of ——. A. M., Referee.

(1) For proceedings if bankrupt fails to obey this order, see Nos. 115. et seq.

#### No. 52.

# Order that Trustee Apply to be Made Party to Suit in State Court.

[Caption.]

At —, in said district, on the —— day of ——, A. D. ——, before A. M., Referee in Bankruptcy.

On motion of the S. Trust Company, trustee herein, it is ordered that said trustee file a petition to be made a party to the suit pending in the —— Circuit Court, styled L. S., etc., against D. G., etc., and said trustee is further directed in said petition to pray the Honorable —— Circuit Court to turn over to it, the S. Trust Company, trustee in bankruptcy, the fund in said —— Circuit Court, in the cause aforesaid.

A. M., Referee in Bankruptcy.

#### No. 53.

# Order of State Court to Pay Over to Trustee in Bankruptcy Fund in Court.

State of ——.

Circuit Court, Common Pleas Division.

L. C. assignee of C. D. & Co., Plaintiff,

vs.

D. G. etc.,

Defendants.

Motion and Order.

This day came the A. B. Trust Company, Trustee in Bankruptcy of C. D. & Co., D. G. and C. D., by R. Y., its attorney, and presented to the court its petition presented to the court June ——, and heretofore filed herein claiming the fund in court herein, together with the exhibits referred to therein and the notice therewith served on the plaintiff, L. C., assignee of C. D. & Co., and on M. A. of the firm of M. A., D. A. and J. G., attorneys for said plaintiff, and also presented a copy of said letter to said L. C., assignee, and his said attorneys, showing that the motion would be presented at this time and hour, viz.,

on the —— day of —— at 10 o'clock a. m, and answer of M. A., D. A. & J. G., attorneys thereto, and thereupon said petitioner, by R. Y., attorney, moved the court that the said petitioner, the A. B. Trust Company, Trustee in Bankruptcy of said bankrupts, C. D. & Co., D. G. and C. D., be made a party defendant to this action, and thereupon said trustee moved the court that said petition be taken as the answer and petition of the said A. B. Trust Company, as such trustee, claiming the fund in court herein, which is so ordered by the court, and thereupon the said A. B. Trust Company, Trustee in Bankruptcy of said C. D. & Company, D. G. and C. D., moved the court for leave to withdraw from the fund in court herein the sum of \$----, and thereupon, the court being sufficiently advised, it is ordered by the court that the said petitioner, the A. B. Trust Company, Trustee in Bankruptcy, of said C. D. & Co., D. G. and C. D., be, and is, allowed to withdraw this day from the fund in court the sum of \$\_\_\_\_

E. F.,
Judge of the —— Circuit Court,
Common Pleas Division.

#### No. 54.

## Proof of Unsecured Debt (1).

(Official Form No. 31.)

In the District Court of the United States

For the —— District of ——.

In the matter of A. B., bankrupt. ·

At —, in said district of —, on the — day of —, A. D. 190—, came E. F., of —, in the county of —, in said district of —, and made oath, and says that A. B., the person by [gr, against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent in the sum of — dollars; that the consideration of said debt

is as follows: Goods sold and delivered at the dates and for the agreed prices set forth in the statement of account hereto attached and made part hereof as Exhibit "A"; that no part of said debt has been paid [except—]; that there are no setoffs or counterclaims to the same [except—]; and that deponent has not, nor has any person by his order, or to his knowledge or belief, for his use, had or received any manner of security for said debt whatever.

E. F.,

Creditor.

Subscribed and sworn to before me this —— day of ——, A. D. 19—. J. M.,

[Official character.]

(1) Gen. Ord. 21.

If the debt to be proven is an open account, maturing on a single date, the following statement should be added, to wit:

"Said debt became [or, will become] due on the —— day of ——, 19—, and no note has been received for such account nor any judgment rendered thereon."

If it consists of items maturing at different dates, the following addition to said form is suggested:

"The average due date of the different items of said account is the —— day of ——. 19—, and no note has been received for such account nor any judgment rendered thereon."

If proof is being made by the assignee of a claim transferred before proof, it must be supported by a deposition of the owner at the time of the commencement of the proceedings, setting forth the true consideration of the debt, and that it is entirely unsecured [or, if secured, the amount and character of securities].

#### No. 55.

# Proof of Secured Debt (1).

(Official Form No. 32.)

In the District Court of the United States for the —— Dis- trict of ——.
In the matter of  Bankrupt.  Bankruptcy.  At —, in said district of —, on the — day of —, in said district of —, in the county of —, in said district of —, and made oath, and says that —, the person by [or, against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent in the sum of — dollars; that the consideration of said debt is as follows:  that no part of said debt has been paid [except ——]
that there are no set-offs or counterclaims to the same [except]; and that the only securities held by this deponent for said debt are the following:
Subscribed and sworn to before me this — day of — A. D. — .  [Official character.]

(1) See note to Form No. 54.

## No. 56.

# Proof of Debt Due Corporation. (1).

(Official Form No. 33.)

In the District Court of the United States for the —— District of ——.
trict or ——.
In the matter of In Bankruptcy.
Bankrupt.
At —, in said district of —, on the — day of —— and state of —, and made oath, and says that he is — of the —, a corporation incorporated by and under the laws of the state of —, and carrying on business at —, in the county of —, and state of —, and that he is duly authorized to make this proof, and says that the said —, the person by [or, against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said corporation in the sum of —— dollars; that the consideration of said debt is as follows:
that no part of said debt has been paid ]except]; that there are no set-offs
or counterclaims to the same ]except
]; and that said corporation has
not, nor has any person by its order, or to the knowledge or
belief of said deponent, for its use, had or received any man-
ner of security for said debt whatever.
— of said Corporation.
Subscribed and sworn to before me this —— day of ——,
A. D. 19—,
[Official character.]
(1) The proof should be made by the treasurer, Gen. Ord. 21. See also note to Form No. 54.

## No. 57.

## Signer of the state of the contraction Proof of Debt by Partnership. (1). .

(Official Fo	orm No. 34.)
	Jnited States for the —— Dis- f ——.
A. D. 19—, came ——, of in said district of ——, and sone of the firm of ——, composed ——, of ——, in the county of the said ——, the person by for adjudication of bankrupt before the filing of said petition indebted to this deponent's said dollars; that the consideration	, on the — day of —, —, in the county of —, made oath, and says that he is onsisting of himself and — ; that [or, against] whom a petition by has been filed, was at and on, and still is, justly and truly aid firm in the sum of — n of said debt is as follows:
that there are no set-offs or co- 	een paid [except]; unterclaims to the same [except is deponent has not, nor has his by their order, or to this de-
ponent's knowledge or belief, any manner of security for sai	for their use, had or received debt whatever.
Subscribed and sworn to be A. D. 19—.	Creditor. fore me this — day of —, [Official character.]
(I) See note to Form No. 54	,

## No. 58.

# Proof of Debt by Agent or Attorney. (1).

(Official Form No. 35.)

Subscribed and sworn to before me this —— day of ——, A. D. 19—.  [Official character.]  (1) See note to Form No. 54.					
No. 59.					
Proof of Secured Debt by Agent. (1).					
(Official Form No. 36.)					
In the District Court of the United States for the —— District of ——.					
In the matter of Bankrupt. Bankrupt.					
At —, in said district of —, on the — day of —, A. D. 19—, came —, of —, in the county of —, and state of —, attorney [or, authorized agent], of —, in the county of —, and state of —, and made oath, and says that —, the person by [or, against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to the said —, in the sum of — dollars; that the consideration of said debt is as follows:					
that no part of said debt has been paid [except —];					
that there are no set-offs or counterclaims to the same [except];					
and that the only securities held by said — for said debt are the following;					

and this deponent further says that this deposition can not be made by the claimant in person because				
and that he is duly authorized by his principal to make this deposition, and that it is within his knowledge that the aforesaid debt was incurred as and for the consideration above stated.  Subscribed and sworn to before me this — day of —,  A. D. 19—.  [Official character.]				
·				
No. 60.				
Affidavit of Lost Bill or Note.				
(Official Form No. 37.)				
In the District Court of the United States for the —— District of ——.				
In the matter of  Bankrupt.  On this — day of —, A. D. 19—, at —, came —  , of —, in the county of —, and state of —, and makes oath, and says that the bill of exchange [or, note], the particulars whereof are underwritten, has been lost under the following circumstances, to wit:				

and that he, this deponent, has not been able to find the same; and this deponent further says that he has not, nor

has the said —, or any person or persons, to their use, to this deponent's knowledge or belief, negotiated the said bill [or, note], nor in any manner parted with or assigned the legal or beneficial interest therein, or any part thereof; and that he, this deponent, is the person now legally and beneficially interested in the same.

Bill or note above referred to.

Date.	Drawer or maker.	Acceptor.	Sum.
		,	

Subscribed and sworn to before me this —— day of ——, A. D. 19—.

[Official character.]

#### No. 61.

## Order Allowing Claim.

[Caption.]

This cause coming on to be heard upon the motion of the German Bank for allowance of its claim together with a lien by virtue of a mortgage, and after hearing counsel for the said bank and also counsel for the trustee and counsel for objecting creditors, it is now ordered that the claim of the said bank be and the same is hereby allowed for the sum of \$—— as a general claim without security or preference, this being the amount of the claim with interest to the date of the adjudication in bankruptcy.

A. M.,

## No. 62. Order Allowing Claims.

[Caption.]

At —, in said district, on the — day of —, A. D. —, before A. M., referee in bankruptcy.

This cause coming on to be heard upon the claims of E. F., First National Bank and Third National Bank, and after hearing counsel for the parties and for creditors objecting to said claims, it is now ordered that the claim of E. F. be, and the same is hereby allowed for the sum of \$---, as a general and unsecured claim; said sum being the balance due upon said debt, with interest to the date of adjudication. It is further ordered that the claim of the First National Bank be, and the same is hereby allowed for the sum of \$--- as a general or unsecured claim, said sum being made up of the unpaid principal of said sum, to wit, \$---, with interest to the date of adjudication. It is further ordered that the claim of the Third National Bank be, and the same is hereby allowed as a mortgage claim to the extent of \$---, with interest thereon from the —— day of ——, that being the day demand by filing claims was made, until the same shall be paid, but this lien shall be subordinate to the mortgage of the S. Trust Company; and further the balance of the claim of the Third National Bank is allowed for the sum of \$--as a general or unsecured claim.

The question of priority between the Third National Bank and parties holding claims for labor performed and materials and supplies furnished is reserved.

A. M.,

Referee in Bankruptcy.

### No. 63.

## Order Disallowing Claim.

[Caption.]

At ——, in said district, on the —— day of ——, A. D. ——, before A. M., Referee in Bankruptcy.

The claim of the E. F. Company having been presented

for allowance and objection thereto having been made by the trustee, now after hearing counsel in favor of and in opposition thereto, the said objection is sustained, and it is ordered that the said claim be, and the same hereby is, disallowed.

A. M., Referee in Bankruptcy.

#### No. 64.

## Order Allowing Attorney Fee (1).

[Caption.]

At —, in said district, on the — day of —, A. D. —, before A. M., Referee in Bankruptcy:

The petition of the trustee for an allowance to R. X., Esq., for services rendered by him in securing the transfer of the fund from the state court to the trustee in bankruptcy coming on to be heard after notice to all counsel of record, and after hearing such counsel it is ordered that the said R. X., Esq., be, and he is, hereby allowed the sum of \$500.00 for the services aforesaid, and the trustee is directed to pay said sum to him at once.

A. M.,

#### No. 65.

## Order Allowing Attorney's Fees (Another Form)

[Caption.]

This cause coming on to be heard upon the report of A. M., referee, upon application for the allowance of attorney's fees, the court upon consideration thereof does allow F. Y., R. Y. and R. S., attorneys for creditors, a joint fee in the sum of \$——, but the court refuses to allow a fee to R. X., counsel for the bankrupt.

#### No. 66.

## Petition to Expunge Claim (1).

District Court of the United States for the — District of —, — Division.

In the matter of F. H., doing business as F. H. & Son, Bankrupt.

No. ——.

In Bankruptcy.

Respectfully represents B. S., trustee of the estate of said bankrupt, that the D. M. Grocery Co., which has this day filed its certain claim herein for allowance and which said claim has been allowed, has received preferences within the four months next immediately preceding the date of the filing of the petition herein and have not surrendered the preferences so received.

Wherefore, he prays that said claim may be disallowed and expunged from the list of claims against the estate of said bankrupt.

B. S.,

Trustee.

(1) Bank. Ord. 21, par. 6.

#### No. 67.

## Waiver of Notice (1).

The District Court of the United States

For the —— District of —— Division.

In the matter of F. H., doing business as F. H. & Son, bankrupt.

No. ----

In Bankruptcy.

The D. M. Grocery Company hereby waives the issuance and service of notice upon it as to the petition of the trustee heretofore filed herein asking that its claim heretofore allowed herein be disallowed and expunged from the list of claims against said estate and consents that said petition of said trustee may be heard on the ——— day of ———, at II o'clock a. m. The D. M. Grocery Co.

<sup>(1)</sup> If notice is not waived, formal notice should be given by mail to creditor. Bank. Ord. 21, par. 6.

#### No. 68.

# Order that Certain Creditors Surrender Preferences Before Allowed to Prove Claims.

Order that certain creditors surrender preferences before allowed to prove claims.

The District Court of the United States For the —— District of ——.

In the matter of F. H., Bankrupt.

This cause coming on for hearing at an adjourned meeting of creditors held pursuant to adjournment on the ——day of —— 19—, and the court having heard all the evidence offered upon the matter of the objection of creditors to the claims of creditors who have received payments upon their claims since the ——day of ——, 19—, which motion of creditors was filed herein on the ——day of ——, 19—, and the court being fully advised, does find that the defendant was insolvent on the ——day of ——19—, that the creditors hereinafter named received the payments hereinafter named upon their claims, since the ——day of —— 19—, and since the defendant became insolvent and within four months preceding the date of the assignment herein and the filing of the petition in bankruptcy herein by the plaintiff.

It is therefore considered, ordered and adjudged by the court that unless the creditors hereinafter named pay to the trustee herein the amounts so received by said creditors respectively since the —— day of —— 19—, and which amounts are set opposite their names, the claims of each of said creditors be, and the same are hereby rejected and disallowed. Said payments to said trustee herein shall be made

by said creditors, respectively, on or before the —— day of the —— day o

(1) Taken from the record in re Hess Spring & Axle Co. vs. Eagle Carriage Co., pending in the District Court of the United States for the Southern District of Ohio.

The claims of creditors who have received preferences, voidable under Sec. 60, subdivision b, or to whom conveyances, transfers, assignments, or incumbrances, void or voidable under Sec. 67, subdivision e, have been made or given, shall not be allowed unless such creditors shall surrender such preferences, conveyances, transfers, assignments, or incumbrances. Sec. 50g of Bankruptcy Act, as amended by act of Feb. 5, 1903.

#### No. 69.

#### Order Disallowing and Expunging List of Claims (1).

The District Court of the United States
For the —— District of ——

In the matter of
F. H.,
Bankrupt.

At —, in the — District of —, on the — day of — 19—.

In accordance with the order heretofore made and upon the evidence submitted to the court upon the following claims against the estate of said bankrupt, and it appearing that said claimants have failed to make repayments as heretofore ordered;

It is now ordered that the following claims herein be dis-

allowed	and ex	kpung	ed fi	rom	the	list	$\mathbf{of}$	claims	upon	the	trus-
tee's rec	ord in	$\operatorname{said}$	case,	viz	:						

Referee in Bankruptcy.

(1) Taken from the record in re Eagle Carriage Co., pending in the District Court of the United States for the Southern District of Ohio.

## No. 70.

### Order Reducing Claim (1).

(Official Form No. 38.)

In the District Court of the United States for the —— District of ——.

At —, in said district, on the — day of —, A. D. 19—.

Upon the evidence submitted to this court upon the claim of —— against said estate [and, if the fact be so, upon hearing counsel thereon], it is ordered that the amount of said claim be reduced from the sum of ——, as set forth in the affidavit in proof of claim filed by said creditor in said case, to the sum of ——, and that the latter-named sum be entered upon the books of the trustee as the true sum upon which a dividend shall be computed [if with interest, with interest thereon from the —— day of ——, A. D. 19—.]

Referee in Bankruptcy.

(1) B. A. 1898, sec. 57k. Gen. Ord. 21, par. 6.

#### No. 71.

## Order Expunging Claim (1).

(Official Form No. 39).

In the District Court of the United States for the —— District of ——.

In the matter of
Bankrupt.
Bankrupt.

At ——, in said district, on the —— day of ——, A. D. 19—.

Upon the evidence submitted to the court upon the claim of —— against said estate [and, if the fact be so, upon hearing counsel thereon], it is ordered that said claim be disallowed and expunged from the list of claims upon the trustee's record in said case.

Referee in Bankruptcy.

(1) B. A. 1898, sec. 57k. Gen. Ord. 21, par. 6.

#### No. 72.

## Petition and Order for Sale by Auction of Real Estate (1).

(Official Form No. 42.)

Respectfully represents —, trustee of the estate of said bankrupt, that it would be for the benefit of said estate that a certain portion of the real estate of said bankrupt, to wit: [here describe it and its estimated value] should be sold by auction, in lots or parcels, and upon terms and conditions as follows:

Wherefore he prays that he may be authorized to make sale by auction of said real estate as aforesaid.

Dated this — day of —, A. D. 19—.

Trustee.

The foregoing petition having been duly filed, and 'aving come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [or, after hearing — in favor of said petition and — in opposition thereto], it is ordered that the said trustee be authorized to sell the portion of the bankrupt's real estate specified in the foregoing petition by auction, keeping an accurate account of each lot or parcel sold and the price received therefor and to whom sold; which said account he shall file at once with the referee.

Witness my hand this —— day of ——, A. D. 19—.

<sup>(1)</sup> B. A. 1898, sec. 49, clause 1, and sec. 2, clause 7; Gen. Ord. 18.

#### No. 73.

# Petition and Order for Redemption of Property from Lien (1).

(Official Form No. 43.)

In the District Court of the United States for the —— District of ——.

In the matter of	
	In Bankruptcy.
Bankrupt.	

Respectfully represents —, trustee of the estate of said bankrupt, that a certain portion of said bankrupt's estate, to wit: [here describe the estate or property and its estimated value] is subject to a mortgage [describe the mortgage], or to a conditional contract [describing it], or to a lien [describe the origin and nature of the lien], [or, if the property be personal property, has been pledged or deposited and is subject to a lien] for [describe the nature of the lien], and that it would be for the benefit of the estate that said property should be redeemed and discharged from the lien thereon. Wherefore he prays that he may be empowered to pay out of the assets of said estate in his hands the sum of ——, being the amount of said lien, in order to redeem said property therefrom.

Dated this — day of —, A. D. 19—.

Trustee.

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days'

notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [or, after hearing —— in favor of said petition and —— in opposition thereto], it is ordered that the said trustee be authorized to pay out of the assets of the bankrupt's estate specified in the foregoing petition the sum of ——, being the amount of the lien, in order to redeem the property therefrom.

Witness my hand this — day of —, A. D. 19—.

Referee in Bankruptcy.

(1) See note to Form No. 72.

#### No. 74.

## Petition to Sell Real Estate Free from Liens (1).

The District Court of the United States

For the —— District of ——

In the matter of
F. H.,

Bankrupt.

To the Honorable ——

Judge of the District Court of the United States,

For the —— District of ——

The plaintiff C. C., respectfully represents to the court that upon the —— day of ——, 19—, P. R. and others instituted a proceeding, No. —— in this court, to have F. H. declared an involuntary bankrupt; that on the —— day of ——, 19—, the defendant, F. H., was adjudicated a bankrupt in said cause; that on the —— day of ——, 19—, the plaintiff, C. C. was elected trustee in bankruptcy, and immediately accepted the trust and qualified.

Plaintiff further represents to the court that at the time F.

H. was adjudicated a bankrupt he was possessed of the following real estate situated in —— county, ——, to wit:

[Follow with description of real estate.]

That the title to said property by operation of law is now vested in this plaintiff as trustee in bankruptcy.

That on the —— day of ——, 19—, after due notice to all parties interested, this plaintiff, as Trustee in Bankruptcy, of F. D., was authorized and directed to bring an action to sell the real estate of said F. H. free from all liens and claims whatsoever; that after the appointment and qualification of the plaintiff as trustee he had the aforesaid real estate appraised, and that the appraisement of Lot No. ——, firstly described above, was returned at \$——; that of Lot No. —— secondly described above, was returned at \$——; that of Lot No. ——, thirdly described above, was returned at \$——.

Plaintiff further represents to the court that the U. Savings Bank, a corporation under the laws of ——, claims to hold a mortgage upon all the aforesaid lots; that the W. G. Bank, a corporation under the laws of ——, claims to hold two mortgages upon Lot —— firstly described above; that O. E. H. claims to have some interest in said Lot No. —— first described above, by way of mortgage; that the defendant O. E. H., wife of the said F. H., claims an inchoate right of dower in said premises.

That plaintiff further represents that, in order to properly administer the estate of the bankrupt, F. H., it is necessary to sell the above described real estate free from all liens and other claims, and to marshal liens; that all the defendants have consented in writing that this proceeding should be brought in the District Court of the United States for the ——— District of ———.

Wherefore, the plaintiff C. C., Trustee in Bankruptcy, prays that subpœnas may issue to F. H., O. E. H., the U. Savings Bank and the W. G. Bank commanding them to set up by answer what claim, if any, each has in said premises herein-

before described; that an order may issue to the plaintiff herein as Trustee in Bankruptcy of F. H., to sell the above described premises at such time and upon such terms as the court may direct free from the liens and claims of these defendants, and free from the dower interest of the said O. E. H.; and that the funds arising from said sale be paid into court for further order; that the liens of the defendants be marshalled, and for all relief that may be necessary and proper in the premises.

C. C.,

Trustee in Bankruptcy of F. H.

R. X. & Y., Attorneys for Trustee. (Affidavit).

(1) Taken from the record in re Nicholas Wolff, pending the District Court of the United States for the Southern District of Ohio.

#### No. 75.

## Decree for Sale Free from Liens (1).

The District Court of the United States

For the —— District of ——
In the matter of

F. H.,

Bankrupt.

This day this cause came on to be heard upon the petition of plaintiff, C. C., trustee, and the answers and cross-petitions of O. E. H., the U. Savings Bank, a corporation under the laws of ——, the W. G. Bank, a corporation under the laws of ——, defendants, and the court finds that it is necessary for the proper administration of the trust of the plaintiff, C. C., Trustee in Bankruptcy of F. H., that the real estate described in his petition should be sold at public sale free from the claims of the defendants herein; and it fur-

ther appearing to the court that the property has already been appraised by appraisers appointed by the referee it is ordered that such appraisement be considered an appraisement for the purposes of this sale.

It is therefore ordered, adjudged and decreed that an order for sale of the various four parcels of real estate described in the petition, issue to C. C., Trustee in Bankruptcy, authorizing and directing him to sell all such property either separately or collectively as to him may seem for the best interests of the estate, as upon execution of property sold by the marshal; that he advertise and sell such parcels either separately or collectively on the premises for not less than —— of their respective appraised values; that he may sell for cash or —— cash, balance in —— and —— years, deferred payments to be secured by mortgage on the premises with interest at six per cent. per annum; and for good cause shown, advertisement in a German newspaper is dispensed with.

The trustee is further ordered to make due return of the order of sale issued herein, and to bring the proceeds of such sale into court for further order herein.

And on motion of the plaintiff, and for good cause shown, the trustee is authorized to employ an auctioneer to conduct the sale who shall receive as compensation a sum not to exceed —— per cent. of the proceeds of the sale, and he may expend the sum of \$—— for extra advertising, which compensation and sum shall be taxed as part of the costs herein.

It is further ordered that the sale of said premises free and clear of the dower interest of the defendant O. E. H., shall be without prejudice to her right to have the value of said dower interest ascertained upon the coming in of the report of any sale made hereunder, and that when the value of said dower interest is ascertained, that the same be paid to her out of the proceeds of said sale, but without prejudice to the rights, if any, of the defendants, the U. Savings Bank and the W. G. Bank, under their mortgages set up in their re-

spective answers and cross-petitions filed herein, in the value of said dower interests.

(1) Taken from the record in re Nicholas Wolff, pending in the District Court of the United States for the Southern District of Ohio.

#### No. 76.

## Final Entry of Distribution on Sale of Real Estate Free from Liens (1).

The District Court of the United States

For the — District of —

In the matter of

F. H.,

Bankrupt.

This day came the parties hereto, and this cause having been referred to A. M., as Special Master and said Special Master having heard the testimony and determined the questions submitted to him in accordance with this decree, and the parties hereto being satisfied with said determination and desiring to avoid the additional expense of a report by said Special Master, by consent of court, a report of the said Special Master herein is hereby waived.

And the court now coming on to distribute the proceeds of the sales herein, remaining in the hands of C. C., trustee herein, amounting to the sum of \$—— does find, and the parties hereto consent thereto, as follows, viz:

The court does find that the defendant, the W. G. Bank has

the first and best lien upon the proceeds arising from the sale of Lot No. —— and the defendant, the U. Savings Bank has the first and best lien upon the proceeds arising from the sale of Lots No. —— and No. —— herein; that the defendant O. E. H., wife of the defendant F. H., is not entitled to any dower in the proceeds arising from sales of any of the lots herein.

The court does find that there are unpaid street assessments due the city of —— upon Lot No. —— amounting to the sum of \$—— which should be paid out of the proceeds of the sale of said Lot No. —— before any payment is made to the said W. G. Bank.

The court does find that there are unpaid street assessments due the city of —— upon Lots No. ——, and No. —— herein amounting to the sum of \$——, which should be paid out of the proceeds of the sales of said lots, before any payment is made to the said U. Savings Bank.

The court does find that there should be paid by the parties hereto as compensation for the services of the Special Master herein, including the payment of stenographer's services by said Special Master, and also the sum of \$—— due the clerk of this court for entering this decree, by said Special Master, the aggregate sum of \$—— for his services herein, and which sum should be borne by the parties hereto in proportion to their respective claims herein, to wit: \$—— thereof by the W. G. Bank, and \$—— by the U. Savings Bank.

The court does find that the proceeds of the sale of said Lot No. — amounted to \$—, from which after deducting the sum of \$— the proportionate part of costs and expenses already paid herein, there is left the sum of \$—— and from which after deducting the sum of \$—— for street assessments and \$—— for Special Master herein, there is left the sum of \$——, which should be paid over and distributed to the defendants, the W. G. Bank upon the notes set up by it in its answer and cross-petition herein.

The court does find that the proceeds of the sale of Lots No.

—, and No. — amounted to \$—, from which after deducting the sum of \$—, the proportionate part of costs and expenses already paid herein, there is left the sum of \$— and from which after deducting the sum of \$— for street assessments and \$—— for the Special Master herein, there is left the sum of \$—, which should be paid over and distributed to the defendant, the U. Savings Bank, upon the note set up by it in its answer and cross-petition herein.

It is therefore considered, ordered and adjudged by the court, with the consent of parties hereto, that the said sum of \$—— in the hands of the trustee herein, be, and the same is hereby distributed and said trustee is hereby ordered and directed to pay the same as follows; to wit:

First. To A. M., for his services as Special Master herein, including stenographer's costs and \$—— to the clerk of this court, the sum of \$——.

Second. To J. K., Treasurer of the city of —— in full of unpaid street assessments on the lots sold herein, said sum of \$—— and \$—— amounting in all to \$——.

Third. To the W. G. Bank upon the notes set up in its answer and cross-petition herein the sum of \$——.

Fourth. To the U. Savings Bank upon the note set up in its answer and cross-petition herein the sum of \$\_\_\_\_.

(1) Taken from the record in re Nicholas Wolff, pending in the District Court of the United States for the Southern District of Ohio.

#### No. 77.

## Petition and Order for Sale Subject to Lien. (1).

(Official Form No. 44.)

In the District Court of the United States for the —— District of ——.

In the matter of
Bankrupt.

Bankrupt.

Respectfully represents —, trustee of the estate of said bankrupt, that a certain portion of said bankrupt's estate, to wit [here describe the estate or property and its estimated value] is subject to a mortgage [describe mortgage], or to a conditional contract [describe it], or to a lien [describe the origin and nature of the lien], or [if the property be personal property] has been pledged or deposited and is subject to a lien for [describe the nature of the lien], and that it would be for the benefit of the said estate that said property should be sold, subject to said mortgage, lien or other incumbrance. Wherefore he prays that he may be authorized to make sale of said property, subject to the incumbrance thereon.

Dated this — day of —, A. D. 190—.

Trustee.

The foregoing petition having been duly filed and having come on for hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [or, after hearing —— in favor of said petition and —— in opposition thereto], it is ordered that the said trustee be authorized to sell the portion of the bankrupt's estate specified in the foregoing petition, by auction [or, at private sale], keep-

ing an accurate account of the property sold and the price received therefor and to whom sold; which said account he shall file at once with the referee.

Witness my hand this — day of —, A. D. 19—.

Referee in Bankruptcy.

(1) See note to Form No. 72.

No. 78.

## General Notice of Petition to Sell Real Estate.

The District Court of the United States For the — District of —

In the matter of No. —— A. B., In Bankruptcy.

Bankrupt.

To the Creditors of A. B., Bankrupt:

You are hereby notified that on Wednesday, ----, at 2 o'clock p. m., at my office, southwest corner of Third and Walnut streets, -, I wil hear the petition hereto annexed and make such order as may seem proper and for the best interests of the estate of bankrupt. Your attendance at said meeting is requested. A. M..

Referee in Bankruptcy.

Dated at \_\_\_\_\_

#### No. 79.

## Trustee's Petition to Sell Portion of Bankrupt's Estate, Subject to Incumbrances (1).

The District Court of the United States

For the — District of —

In the matter of

F. H.,

Bankrupt.

Respectfully represents C. C., trustee of the estate of said bankrupt, that a certain portion of said bankrupt's estate, to wit: Lot No. — in E. J. M.'s first subdivision of —, is subject to a mortgage to the C. B. Loan & Savings Company of —, in the sum of \$—— and is also subject to the dower right of O. E. H., wife of bankrupt; and taxes and assessments, and that it would be for the benefit of said estate that said real estate should be sold, subject to the said mortgage and dower.

Wherefore he prays that he may be authorized to make sale of said real estate subject to the incumbrances thereon.

Dated this — day of — 19—.

C. C.,

Trustee in Bankruptcy.

(1) Taken from the record in re Frederick J. Bradshaw, pending in the District Court of the United States for the Southern District of Ohio.

## No. 80.

# Order Authorizing Trustee to Sell Portion of Bankrupt's Estate, Subject to Incumbrances. (1).

The District Court of the United States

For the — District of —

In the matter of

F. H.,

Bankrupt.

This cause coming on for hearing on the petition of the trustee to sell the real estate of bankrupt, subject to liens, and

said petition having been filed on the —— day of ——, 19—, and having come on for hearing before me this day, of which hearing more than —— days notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat, it is ordered that the trustee herein be authorized to sell the portion of bankrupt's estate referred to in his petition, subject to the liens, etc., thereon, at private sale. The trustee is directed to advertise on the - day of -, 19, in the C- Index, for bids to be sent to the trustee up to — o'clock on the — day of —, 19—. Said trustee is directed to report said bids at a hearing before the undersigned referee on the —— day of ——, 19—, at which time an adjourned meeting will be held for the purpose of accepting or rejecting the highest and best bid so received. Said bids shall be for cash, on confirmation by the court.

Referee in Bankruptcy.

(1) Taken from the record in re Frederick J. Bradshaw, pending in the District Court of the United States for the Southern District of Ohio.

#### No. 81.

## Notice of Trustee's Sale Subject to Liens.

The District Court of the United States

For the — District of —

— Division No. —

In re Bankruptcy of F. H.

In pursuance of an order to me directed, I will receive at my office, southwest corner of Third and Walnut streets, —, up to 2 o'clock p. m., on —, bids for the purchase of the bankrupt's real estate, known as No. — K. avenue, —, and being Lot — in E. J. M.'s first subdivision of —, subject to a mortgage to the C. B. Loan and Savings Company of —, in the sum of about —, and also subject to the dower right of O. E. H., wife of bankrupt, and to taxes

and assessments. Terms of sale to be cash on confirmation by the court. All bids will be reported by me at an adjourned meeting of creditors held before A. M., Referee in Bankruptcy, southwest corner Third and Walnut streets,——, on——, at 2 o'clock p. m., for the action of said referee.

C, C., Trustee in Bankruptcy.

#### No. 82.

#### Report of Trustee of Sale Subject to Incumbrances (1).

The District Court of the United States
For the —— District of ——
In the matter of
F. H.,
Bankrupt.

Referee in Bankruptcy.

#### Dear Sir:

To A. M., Esq.,

The undersigned trustee herein begs to report that in accordance with the order of court, he advertised for bids for the purchase of the bankrupt's real estate, known as No. — K. avenue — and being Lot No. — in E. J. M.'s first subdivision of —, subject to the mortgage of the C. B. Loan & Savings Company of —, and also subject to the dower right of O. E. H., wife of bankrupt, and to taxes and assessments. Publication of notice was made in the C. I. on the — day of —, 19—, and copies of said publication were also mailed to all creditors, proof of publication of notice in the C. I. is hereto attached and also copy of notice sent to all creditors.

The undersigned trustee reports that he has received the bid hereto attached of O. E. H., offering to pay the sum of \$——for said real estate, subject to said liens, etc. The under-

, Dillimot 101.
signed trustee reports that said bid was the only bid received by him and he recommends the acceptance of said bid and asks for such order as the court may see proper to make in the premises.  C. C.,  Trustee in Bankruptcy.
—— day of ——, 19—.
(1) Taken from the record in re Frederick J. Bradshaw, pending in the District Court of the United States for the Southern District of Ohio.
No. 83.
Petition and Order for Private Sale. (1).
(Official Form No. 45.)
In the District Court of the United States for the —— District of ——.
In the matter of Bankrupt.  In Bankruptcy.
Respectfully represents ——, duly appointed trustee of the estate of the aforesaid bankrupt.  That for the following reasons, to wit:
it is desirable and for the best interest of the estate to sell at private sale a certain portion of the said estate, to wit
3371 for the course that he may be eathering to all the

Wherefore he prays that he may be authorized to sell the said property at private sale.

Dated this — day of —, A. D. 19—.

Trustee.

The foregoing petition having been duly filed and having
come on for a hearing before me, of which hearing ten days'
notice was given by mail to creditors of said bankrupt, now,
after due hearing, no adverse interest being represented there-
at [or, after hearing — in favor of said petition and —
in opposition thereto], it is ordered that the said trustee be
authorized to sell the portion of the bankrupt's estate specified
in the foregoing petition, at private sale, keeping an accurate
account of each article sold and the price received therefor and
to whom sold; which said account he shall file at once with the
referee.

Witness my hand this —— day of ——, A. D. 19—.

Referee in Bankruptcy.

(1) See note to Form No. 72.

### No. 84.

## Petition and Order for Sale of Perishable Property (1).

(Official Form No. 46.)

In the District Court of the United States for the —— District of ——.

In the matter of
Bankrupt

Bankrupt

Respectfully represents —, the said bankrupt [or, a creditor, or, the receiver, or, the trustee of the said bankrupt's estate].

That a part of the said estate, to wit:

now in.—, is perishable, and that there will be loss if the same is not sold immediately.

Wherefore he prays the court to order that the same be sold immediately as aforesaid.

Dated this — day of —, A. D. 189—.

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to the creditors of the said bankrupt [or, without notice to the creditors], now, after due hearing, no adverse interest being represented thereat [or, after hearing —— in favor of said petition, and —— in opposition thereto], I find that the facts are as above stated and that the same is required in the interest of the estate, and it is therefore ordered that the same be sold forthwith and the proceeds thereof deposited in court.

Witness my hand this —— day of ——, A. D. 189—.

Referee in Bankruptcy.

(1) Gen. Ord. 18, par. 3.

#### No. 85.

## Order for Sale of Uncollected Accounts (1).

The District Court of the United States

For the — District of —

In the matter of

F. H.,

Bankrupt.

For good cause shown, and in pursuance of direction of creditors the trustee herein is hereby ordered and directed to advertise for bids for uncollected accounts remaining in the hands of the trustee herein and uncollected. Said advertisement shall give ten days' notice of the time and place when the trustee will receive bids, and such notice shall be advertised once in the —— Enquirer and once in the —— Tribune. Said bids shall be for cash, upon the confirmation of bid by the court. Said trustee is directed to return his report of bids without unnecessary delay.

(1) Taken from the record in re Eagle Carriage Co., pending in the District Court of the United States for the Southern District of Ohio.

#### No. 86.

#### Notice of Sale of Uncollected Accounts (1).

The District Court of the United States
For the —— District of ——

In the matter of

F. H.,

Bankrupt.

In pursuance of an order directed to me on the matter of the bankruptcy of F. H., No. —, in the District Court of the United States for the — District of —, I will receive bids for the purchase of all the uncollected accounts of the said F. H., remaining in my hands as trustee, at my office Room — Building —, up to the — day of —, 19—, at — o'clock.

Terms of sale, cash on day of sale, subject to confirmation by the court. The right is reserved in the court to reject any or all bids. A list of such uncollected accounts can be seen at my office on application to the undersigned. C. C.,

Trustee in Bankruptcy.

<sup>(1)</sup> Taken from the record in re Eagle Carriage Co., pending in the District Court of the United States for the Southern District of Ohio.

#### No. 87.

## Notice of Sale of Bank Stock (1).

The District Court of the United S	States
For the — District of —	_
In the matter of	
F. H.,	

Bankrupt.

Notice is hereby given pursuant to an order made in the matter of the bankruptcy of F. H., No. — in the District Court of the United States for the — District of —, we will on behalf of the Trustee in Bankruptcy of said F. H., and of all others concerned, offer at public sale to the highest and best bidder on the — day of —, 19—, at — o'clock, at the — Stock Exchange, No. — street, — shares of the capital stock of the W. G. Bank of —, each of said shares being of the par value of \$—. Terms of sale cash on confirmation of sale by the court.

(1) Taken from the record in re Nicholas Wolff, pending in the District Court of the United States for the Southern District of Ohio.

#### No. 88.

## · Report of Sale of Bank Stock (1).

The District Court of the United States

For the — District of —

In the matter of

F. H.,

Bankrupt.

To the Referee in the Said Above Cause:

The undersigned auctioneers herein, beg to report that in pursuance of the order of court they sold on the —— day of

—, 19—, at the Stock Exchange in —— shares of stock of the W. C. Bank, each share of the par value of \$—— to C. M., at \$——, making a total for said —— shares of \$——. We attach hereto copy of advertisement and bill for the same. The costs of said sale have been \$——, for advertising, and \$—— for our commission. The balance amounting to \$—— will be paid over to C. C., trustee, on confirmation of said sale. We respectfully ask that the sale be confirmed.

I. B. & Company.

(1) Taken from the record in re Nicholas Wolff, pending in the District Court of the United States for the Southern District of Ohio.

#### No. 89.

Report of Trustee's Sale of Unmanufactured Stock (1).

The District Court of the United States

For the — District of —

In the matter of

F. H.,

Bankrupt.

Pursuant to an order to me directed as Trustee in Bankruptcy of F. H., bankrupt, No. — District Court of the United States, — District of —, I will on the — day of —, 19—, at — o'clock, on the premises on — street, —, offer at public sale all the goods, chattels and personal property of said bankrupt [except book accounts and cash on hand], consisting of unmanufactured stock used in the manufacture of —, as per inventory on file with A. M., Referee in Bankruptcy, and a copy of which can be seen at my office No. —, street, —. Terms of sale to be cash upon the confirmation by the court. Said property to be sold as an entirety. The highest and best bid to be returned to said court for confirmation or other action on the — day of —, 19—.

Trustee in Bankruptcy.

. (1) Taken from the record in re Eagle Carriage Co., pending in the District Court of the United States for the Southern District of Ohio.

## No. 90.

## Notice of Petition and Sale of Chattels (1).

The District Court of the United States
The —— District of ——.
—— Division.
In the matter of
A. B.,
In Bankruptcy.
This day the trustee filed his petition for authority to sell
the stock of goods of the bankrupt in lots at public auction to
the highest bidder without reserve; said petition will come or
for hearing at the office of the undersigned 1603 Union Trust
Building, —, on —, at — o'clock —m., and if not ther
otherwise ordered said sale will be ordered and held —, as
advertised. M. W., Referee.
Dated at ——.  (1) The above form of notice has been used when it was advisable to save time, and the necessity of giving a second notice of sale for terms.
days after sale is ordered.
No. 91.
Trustee's Report of Exempted Property (1).
(Official Form No. 47.)
In the District Court of the United States for the —— District of ——.
In the matter of Bankrupt.  In Bankruptcy.
Ponlament III Danki upicy.
Bankrupt.
At —, on the —— day of ——, 19—.  The following is a schedule of property designated and set

apart to be retained by the bankrupt aforesaid, as his own property, under the provisions of the Acts of Congress relating to bankruptcy:

General head.	Particular description.	Valu	te.
Military uniform, arms, and equipments		Dolls.	Cts.
Property exempted by state laws			

Trustee.

(1) B. A. 1898, sec. 47, clause 11.

#### No. 92.

#### Trustee's Return of no Assets.

(Official Form No. 48.)

In the District Court of the United States for the —— District of ——.

In the matter of Bankrupt.	In Bankruptcy:
Bankrupt.	

At —, in said district, on the — day of —, A. D. 18—.

On the day aforesaid, before me comes —, of —, in the county of —, and state of —, and makes oath and says that he, as trustee of the estate and effects of the abovenamed bankrupt, neither received nor paid any moneys on account of the estate.

Subscribed and sworn to before me at ——, this —— day of ——, A. D. 19—.

Referee in Bankruptcy.

		1	ප්	Dolls, Cts. Dolls. Cts.
			, trustee.	
93.	Account of Trustee (1).	(Official Form No. 49.)	, bankrupt, in account with	
No. 93.	of T	Forn	, in ac	Cts.
	count	Official	ankrupi	Dolls. Cts.
	¥	$\subseteq$	, bi	Cts.
				Dolls.
			The estate of —	
,			DR.	

(1) B. A. 1898, sec. 47, clause 10. Gen. Ord. 17.

## No. 94.

## Oath to Final Account of Trustee.

(Official Form No. 50.)

<b>\</b> -,
In the District Court of the United States for the —— Dis .trict of ——.
In the matter of  Bankrupt.  On this — day of —, A. D. 19—, before me come and makes oath, and says that he was, on the — day of —, A. D. 19—, appointed trustee of the estate and effects of the above-named bankrupt, and that as such trustee he has conducted the settlement of the said estate. That the account hereto annexed, containing — sheets of paper, the first sheet whereof is marked with the letter — [raference markere also be made to any prior account filed by said trustee] is true, and such account contains entries of every sum of money received by said trustee on account of the estate and effects of the above-named bankrupt, and that the payment purporting in such account to have been made by said trustee have been so made by him. And he asks to be allowed for said payments and for commissions and expenses as charged in said accounts.  Trustee.  Subscribed and sworn to before me at —, in said —
district of ——, this —— day of ——, A. D. 19—.  [Official character.]

#### No. 95.

## Order Allowing Account and Discharging Trustee.

(Official Form No. 51.)

In the District Court of the United States for the — District of —.

In the matter of \_\_\_\_\_\_ In Bankruptcy.

Bankrupt.

The foregoing account having been presented for allowance, and having been examined and found correct, it is ordered that the same be allowed, and that the said trustee be discharged of his trust.

Referee in Bankruptcy

#### No. 96.

## Notice of Filing Account, Declaration of Dividends, etc.

The District Court of the United States
For the — District of —

In the matter of
A. B.,
Bankrupt.

In Bankruptcy.

To the Creditors of the Above Named Bankrupt:

Notice is hereby given that the trustee has filed his final account showing \$—— balance on hand, and that the final meeting of the creditors of said bankrupt will be held at the office of the undersigned, 1603 Union Trust Building, ——, on the —— day of ——, at 2 o'clock p. m., when the creditors may object to the confirmation of said account, transact other business, and the court will make allowances to counsel for bankrupt and trustee, and will declare a dividend to the creditors who have proved their claims to be paid by the trustee five days thereafter.

M. W.,

Referee in Bankruptcy.

Dated ——.

#### No. 97.

#### Notice.

The District Court of the United States
For the — District of —

In the matter of
A. B.,

Bankrupt

In Bankruptcy.

To the Creditors of the Above Named Bankrupt:

Notice is hereby given that the trustee has filed his final account showing no property other than the bankrupt's exemp-

tions, and that the final meeting of the creditors of said bank-
rupt will be held at the office of the undersigned, 1603 Union
Trust Building, —, on the — day of — at 2 o'clock p.
m., when the creditors may object to the confirmation of said
account, and transact other business.

M. W.,

Referee in Bankruptcy.

Dated at ——.

#### No. 98.

List of Claims and Dividends to be Recorded by Referee and by him Delivered to Trustee. (1).

(Official Form No. 40.)

In the District Court of the United States for the —— District of ——.

In the matter of
Bankrupt.

Bankrupt.

At —, in said district, on the — day of —, A. D. 19—.

A list of debts proved and claimed under the bankruptcy of —, with —— dividend at the rate of —— per cent. this day declared thereon by ——, a referee in bankruptcy.

Creditors.  [To be placed alphabetically, and the names of all the parties to the proof to be carefully set forth.]	Sum p	roved.	Dividend.		
	Dollars.	Cents.	Dollars.	Cents,	
•					
	,				
	To be placed alphabetically, and	[To be placed alphabetically, and the names of all the parties to the proof to be carefully set forth.]	[To be placed alphabetically, and the names of all the parties to the proof to be carefully set forth.]	[To be placed alphabetically, and the names of all the parties to the proof to be carefully set forth.]	

Referee in Bankruptcy.

(1) B. A. 1898, sec. 39, clause 1.

#### No. 99.

## Notice of Dividend (1).

(Official Form No. 41.)

In the District Court of the United States for the —— District of ——.

In the matter of

Bankrupt.

At —, on the — day of —, A. D. 18—.

To ----,

Creditor of ----, bankrupt.

I hereby inform you that you may, on application at my office, —, on the —— day of ——, or on any day thereafter, between the hours of ——, receive a warrant for the —— dividend due to you out of the above estate. If you can not personally attend, the warrant will be delivered to your order on your filling up and signing the subjoined letter.

Trustee.

#### CREDITOR'S LETTER TO TRUSTEE.

To ----.

Trustee in bankruptcy of the estate of ——, bankrupt:
Please deliver to —— the warrant for dividend payable out of the said estate to me. ——,

Creditor.

#### No. 100.

## Order for Costs and Confirming Accounts (1).

The District Court of the United States

For the — District of —

In the matter of

F. H.,

Bankrupt.

At —, in the — District of — on the — day of — A. D. 19—.

This cause coming on for hearing after due notice by mail to each creditor:

It is	ordere	d tha	at the	follo	wing	sums	Ъе	paid	as costs,	com-
mission	s and	fees	hereir	ı, to	wit:					

C. C., Trustee's Commissions,	\$
A. M., Referee's Commissions,	\$
B. R., Clerk's Costs,	\$
C. I., Publications, etc.,	\$ <del></del>
C. I., For Discharge,	\$
A. M., Stationery,	\$
T. M. S., Stenographer, etc.,	\$
G. O., Services in Rejecting Claims	\$

Total

\$----

It is further ordered that the amended account of the trustee, filed the —— day of ——, 19—, and the amended account of the receiver, filed the —— day of —— 19—, herein, having been examined and found correct are each hereby allowed.

A. M.,

Referee in Bankruptcy.

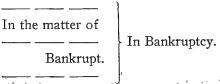
(1) Taken from the record in re Eagle Carriage Co., pending in the District Court of the United States for the Southern District of Ohio.

#### No. 101.

## Order for Choice of New Trustee (1).

(Official Form No. 55.)

In the District Court of the United States for the —— District of ——.



At —, on the — day of —, A. D. 19—.

Whereas, by reason of the removal [or, the death, or, res-

ignation] of —, heretofore appointed trustee of the estate of said bankrupt, a vacancy exists in the office of said trustee.

It is ordered that a meeting of the creditors of said bankrupt be held at —, in —, in said district, on the — day of —, A. D. 18—, for the choice of a new trustee of said estate.

And it is further ordered that notice be given to said creditors of the time, place and purpose of said meeting, by letter to each, to be deposited in the mail at least ten days before that day.

Referee in Bankruptcy.

(1) B. A. 1898, sec. 44 and 50c.

#### No. 102.

## Notice of Final Meeting of Creditors.

The District Court of the United States

For the — District of — No. —

In re Bankruptcy of A. B.

To the Creditors of A. B., in the County of —— and District Aforesaid, a Bankrupt:

Notice is hereby given that on Tuesday, the —— day of ——, at 3 o'clock p. m., there will be a final meeting of the creditors of the above named bankrupt held at the office of the undersigned referee, southwest corner of Third and Walnut streets, ——, for the purpose of passing upon the accounts of the trustee, declaring a dividend, authorizing the sale of uncollected accounts at a sum to be fixed, and transacting such other business as may properly come before said meeting, and finally closing the affairs of the estate of said bankrupt.

Your presence is requested at said meeting.

A. M.,

Referee in Bankruptcy.

Dated at ----

## No. 103.

# Record of Proceedings Before Referee — No Trustee and no Assets (1).

	No. —— In Bankruptcy. Record of Proceed- ings Before Referee.
V 1	of reference, petition and schedules received om clerk.
at re	pt directed to attend before referee on ——————————————————————————————————
Ordere	d that first meeting of creditors be held on — at ——.
tin	of first meeting of creditors published ——nes in the newspaper designated by the urt.
Notice	of first meeting of creditors mailed to each editor listed in schedules.
, ,	of publication and mailing of notice of first eeting filed.

Date			
	Held first meeting of creditors; ba and examined by ——; sche no assets and no creditor app that no trustee be appointed meeting of the creditors be cal	dule disc earing, or and no	losing rdered
	Forwarded record of proceedings to Expenses incurred.	o clerk.	• • • • • •
		\$	cts.
Date.	List of Claims Filed with Referee.	Dollars.	Cents.

[Add certificate of referee No. 106.]

(1) This form is conveniently used as a docket containing the steps of the case. With it should be bound all the orders made by the referee and copies of notices as rxhibits, the whole constituting the separate record book of the case, as required by Bank. Act 1898, sec. 42b.

When the same is transmitted to the clerk at, the conclusion of the case (Bank. Act 1898, sec. 39a, cl. 7) the form of certificate No. 106 may be used.

#### No. 104.

## Record of Proceedings Before Referee, Claims Proved, Trustees Appointed, Assets Distributed.<sup>1</sup>

[Proceed as in Form No. 103 to "held first creditors' meeting," etc., and then proceed as follows:]

## Date.

	First meeting of creditors held and —— appointed trustee by creditors or referee, creditors failing to appoint, and bond of trustee fixed at \$—— notified trustee of —— appointment.  Received acceptance of trust from trustee.  Bond of trustee presented and approved.
	Bond of trustee presented and approved.
	Appointed —— appraisers to appraise real and personal property of bankrupt.
	Received report of appraisers.
	Received report of trustee of moneys in ——hands, of no assets.
	Prepared dividend sheets showing —— per cent. of each claim allowed.
	Received final account of trustee.
	Examined the account of ——.
-	Entered order discharging trustee.
	Forwarded copy of proceedings to clerk.
\	Expenses Incurred.   Dollars.   Cents
ate.	Expenses Incurred. Dollars. Cents

Date.	List of Claims Filed with Referee.	Dollars.	Cents
. }			
ŀ		<u> </u>	
İ			
r 4 3 7	- Mifanta of matamana No. 106 l		1
-	certificate of reference No. 106.] te to No. 103.	,	
(1000 III			
	No. 105.	•	
Recor	d of Proceedings Before Referee on C	Compositio	$n.^1$
[Proce	eed as in Form No. 103 to "held first	creditors'	meet-
ing,'' etc	e., and proceed as follows:]		
Date.			
1	First meeting of creditors held and	ap	point-
	ed trustee by referee, creditors		
	point and bond of trustee fixed	_	<b>-</b> , ^
	Notified trustee of his appointment.		
	Received acceptance of trust from	trustee.	
	Bond of trustee presented and app		
	Received order referring petition of composition ——.		pt for
	Entered order fixing —— at ——	for meet	ing of
	creditors to consider composition		ing or
	Mailed notices to all creditors, ment		sched-
	ules, of meeting to consider co		
	Meeting of creditors to consider co	~	
	per cent. accepted by cre	-	
		<i></i>	
	Made report to court of proceeding	s before	me on
	petition for composition.		
	Forwarded record of proceedings t	o clerk.	

Date.

Date.	Expenses Incurred.	Dollars.	Cents
Date.	List of Claims Filed with Referee.	Dollars.	Cents

[Attach certificate Form No. 106.]

(1) See note to No. 103.

No. 106.

#### Certificate of Referee to Record of Proceedings.

In the District Cou	ort of the United States
For the ——	District of —
—— Divisio	n.
In the matter of A. B.,	) No. ——
A. B.,	In Bankruptcy.

I, A. M., one of the referees of said court in bankruptcy, do hereby certify that the foregoing is the true and complete record of the proceedings had before me in the above entitled matter, which, together with such papers as are on file before me, I herewith transmit to the court.

Dated at —— the —— day of —— 190—.

A. M.,

Referee in Bankruptcy.

#### COMPOSITION WITH CREDITORS.

#### No. 107.

## Petition for Meeting to Consider Composition (1).

(Official Form No. 60.)

In the District Con	art of the United States for the —— Dis- trict of ——.
In the matter of Bankrupt.	In Bankruptcy.
To the Honorable	Indee of the District Court of the

To the Honorable —, Judge of the District Court of the United States for the — District of —:

The above-named bankrupt respectfully represent that a composition of — per cent. upon all unsecured debts, not entited to a priority — in satisfaction of — debts has been proposed by — to — creditors, as provided by the Acts of Congress relating to bankruptcy, and — verily believe that the said composition will be accepted by a majority in number and in value of — creditors whose claims are allowed.

Wherefore, they pray that a meeting of —— creditors may be duly called to act upon said proposal for a composition, according to the provisions of said acts and the rules of court.

Bankrupt.

<sup>(1)</sup> B. A. 1898, sec. 12;

1850 C. Carrier Co., 19 No. 408. C. 12 Br. Steel.

## Order for Meeting to Consider Composition.

In the District Court of the United States

For the — District of —

In the matter of
A. B.,
Bankrupt.

In Bankruptcy.

On reading and filing the verified petition of A. B., the bankrupt showing that he verily believes that a composition upon all unsecured debts not entitled to a priority will be accepted by a majority in number and in value of his creditors whose claims are allowed.

It is ordered that a meeting of the creditors of said A. B., bankrupt, be held at —— before A. M., Esq., Referee in Bankruptcy, for the purpose of considering the composition proposed to be offered in satisfaction of the debts due from said bankrupt to his creditors and that notice of the time, place and purpose of said meeting be sent by said above named referee, by mail, to each of the known creditors of said bankrupt whose name and address appear in schedules on file in this matter at least ten days prior to the day appointed for the holding of such meeting.

Witness the Honorable G. R., Judge of the said court, and the seal thereof, at ——, this —— day of —— A. D., 190—.

B. R.,

Clerk of Said Court.

#### No. 109.

## Notice to Creditors of Meeting to Consider Composition.

In the District Court of the United States

For the — District of —

In the matter of
A. B.,
Bankrupt.

In Bankruptcy.

Notice to creditors to consider composition offered by bankrupt.

Take notice, that a meeting of the creditors of the above named bankrupt will be held at Room 13, third floor, Post-office Building, city of —, before the undersigned Referee in Bankruptcy, on the —— day of —— 190— at —— o'clock a. m., for the purpose of considering a proposed composition made by the said bankrupt to his creditors in satisfaction of the unsecured debts, [not entitled to priority] owed by him to each of said creditors, which proposed composition is to pay —— per cent.

A. M.,

Referee in Bankruptcy.

I hereby certify that I have on this —— day of —— A. D., —— sent by mail copies of the above notice of the meeting for composition and have duly published the same, as appears from the proof of publication hereto annexed. A. M.,

Referee.

#### No. 110.

## Report of Referee on Composition.

In the District Court of the United States

For the —— District of ——.

In the matter of A. B., Bankrupt. Referee's Report.

Pursuant to an order made by the court on the —— day of —— 190—, a meeting of the creditors of the above named

bankrupt to consider a composition of — per cent. upon all unsecured debts not entitled to a priority in satisfaction of said debts, was on the — day of —, A. D. 190—, held before me at Room 13, Union Trust Building in the city of —, at — o'clock in the forenoon of the said day.

Proof of mailing of notice to each of the creditors, mentioned in the bankrupt's schedules, of the time, place, and purpose of said meeting, is hereto annexed.

That the said above named bankrupt was present at the said meeting and offered himself for examination by any of the creditors represented at said meeting.

That an offer of composition with his said creditors was accepted by a majority in number and in value of all his creditors whose claims have been allowed, which acceptance is hereto annexed and made a part of this report.

Proofs of claims of creditors voting for said composition were presented and allowed before signing of said resolution which are hereto annexed.

That the following are the names of those creditors who have presented claims against the said bankrupt's estate and were duly allowed, but who did not consent to, or sign said composition. [Set out list of names of such creditors and amount of claims proved.]

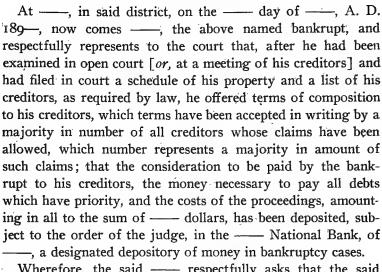
#### No. 111.

# Application for Confirmation of Composition (1). (Official Form No. 61.)

In the District Court of the United States for the —— District of ——.

In the matter of	In Bankruptcy.
Bankrupt.	

To the Honorable ——, Judge of the District Court of the United States for the —— District of ——.



Wherefore, the said —— respectfully asks that the said composition may be confirmed by the court. ——,

Bankrupt.

(1) B. A. 1898, sec. 12 and sec. 2, clause 9.

#### No. 112.

## Order for Hearing on Petition to Confirm Composition.

In the District Court of the United States

For the —— District of ——.

In the matter of

A. B.,
Bankrupt.

In Bankruptcy.

At —, in said district, on the —— day of —— A. D., —— on reading and filing the application of the above named bankrupt for confirmation of a composition offered, and it appearing satisfactorily to the court, from the report of A. M.,

Esq., referee, of all proceedings herein, that a majority in number and in value of his creditors whose claims have been allowed and whose claims were proved by proofs of claim presented to said referee, and which are presented to the court with said report did, at said meeting pass and vote [as appears by the said report of the proceedings of said meeting] in favor of a composition, which is set forth at length in said proceedings, resolving that the composition proposed by said bankrupt at said meeting shall be accepted in satisfaction of the unsecured debts due from said bankrupt to his creditors; now therefore on motion of R. X., Esq., attorney for said bankrupt.

It is ordered that a hearing in the matter of composition by said bankrupt be had before this court at the United States Court Rooms, Postoffice Building, in the city of —, on the — day of — A. D., — at 10 o'clock a. m., for the purpose of said court inquiring, upon hearing whether the said composition so proposed by said bankrupts has been passed in the manner directed by the Act of Congress relating to bankruptcy, approved July 1, 1898, and has been accepted by the signatures required by said act and whether it is for the best interest of the creditors; that a notice of the time, place and purpose of said hearing be sent by the clerk of this court, by mail, to each of the creditors to their respective addresses as they appear in the list of creditors of the bankrupt or as afterwards filed with the papers in the case by the creditors (1) at least ten days prior to the said day appointed herein for such hearing.

(1) See Bank. Act 1898, sec. 58.

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#### No. 113.

## Order Confirming Composition (1),

(Official Form No. 62.)

In the District Cou	rt of the United State	es for	the — Dis-
18 ·	trict of ——.	. ;	and the second
In the matter of			
	In Bankruptcy.	1	.,
Bankrupt.	grant of a rear		

An application for the confirmation of the composition offered by the bankrupt having been filed in court, and it appearing that the composition has been accepted by a majority in number of creditors whose claims have been allowed and of such allowed claims; and the consideration and the money required by law to be deposited having been deposited as ordered in such place as was designated by the judge of said court, and subject to his order; and it also appearing that. it is for the best interests of the creditors; and that the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge, and that the offer and its acceptance are in good faith and have not been made or procured by any means, promises or acts contrary to the Acts of Congress relating to bankruptcy: It is therefore hereby ordered that the said composition be and it hereby is confirmed.

Witness the Honorable —, judge of said court, and the seal thereof, this —— day of —— A. D. 19—.

[Seal of the court.]

Clerk.

<sup>(1)</sup> B. A. 1898, sec. 2, clause 9 and sec. 12; Gen. Ord. 32. Loveland's

#### No. 114.

### Order of Distribution on Composition.

(Official Form No. 63.)

·	,
United States of A	America:
In the District Cou	art of the United States for the Dis-
	trict of ——.
In the matter of	
	In Bankruptcy.
Bankrupt.	

The composition offered by the above named bankrupt in this case having been duly confirmed by the judge of said court, it is hereby ordered and decreed that the distribution of the denosit shall be made by the clerk of the court as follows, to wit: First. To pay the several claims which have priority. Second. To pay the costs of proceedings. Third. To pay, according to the terms of the composition, the several claims of general creditors which have been allowed and appear upon a list of allowed claims on the files in this case, which list is made a part of this order.

Witness the Hon. —, judge of said court, and the seal thereof, this — day of —, A. D. 190—.

[Seal of the court:] —,

Clerk.

## PROCEEDINGS BEFORE JUDGE SUBSEQUENT TO ADJUDICATION.

### No. 115.

## Motion for Rule to Show Cause Against Bankrupt for Contempt.

[Caption.]

Now come the undersigned creditors herein, and move the court that a rule issue herein directing A. B., the bankrupt, to appear in this court at —— County of ——, on the —— day of ——— 19—, at ——— o'clock a. m., and show cause why an atachment for contempt should not issue against him for disobedience of the order of A. M., referee herein, a copy of which order is as follows:

First. That the said bankrupt A. B., within twenty days from and after the service of a copy of this order upon him, pay over to B. M., Esq., trustee, the sum of \$—— and deliver to said trustee United States three per cent. coupon bonds, face value of \$——, or \$—— in money.

Second. That in the event of the said bankrupt A. B., failing or neglecting to obey this order to pay to the said trustee the above amounts, and deliver said bonds or money, the said B. M., Esq., as such trustee is hereby ordered and directed to institute proceedings against the above named A. B. in accordance with the provisions of Sections 29 of the Bankruptcy Act of 1898.

And it is further ordered that a copy of this order be served personally upon the said A. B., the said bankrupt, and by mail upon R. X., Esq., attorney for the bankrupt, and on B. M., Esq., said trustee.

E. F.,

G. H.,

By Y. & Y., their Attorneys.

#### No. 116.

## Affidavit of Trustee that Bankrupt Has Not Obeyed Order of Referee.

· [Caption.] grant of world have him deportation of the
B. M., being first duly sworn says on oath that he is the duly
appointed trustee herein, and that the said bankrupt has not
in any way complied with the order of the referee herein here-
tofore made, requiring said bankrupt to pay to the trustee the sum of \$ and United States Government bonds,
three per cent. face value of \$, that he has not paid said
sum or any part thereof to the said trustee.
Affiant further says not.
В. М.,
Sworn to and subscribed before me this — day of ——
(D) II

County,—.

#### No., 117.

## Rule to Show Cause Against Bankrupt for Contempt.

[Caption.]

[Seal.]

On motion of creditors herein, a rule is allowed to issue herein directing A. B., the bankrupt, to appear before this court at —, — County, —, on the —— day of —— 19—, at —— o'clock, a. m., and show cause why an attachment for contempt should not issue against him for disobedience of the order of A. M., refere herein, and which order reads as follows:

First. That the said bankrupt A. B., within twenty days from and after the service of a copy of this order upon him pay over to B. M., Esq., trustee, the sum of \$---- and deliver to said trustee United States three per cent. coupon bonds, face value of \$----, or \$---- in money.

Second. That in the event of said bankrupt A. B., failing or neglecting to obey this order to pay the said trustee the above amounts, and deliver said bonds or money, the said B. M., Esq., as such trustee, is hereby ordered and directed to institute proceedings against the above named A. B., in accordance with the provisions of Section 29 of the bankruptcy act of 1898.

Third. And it is further ordered that a copy of this order. be served personally upon the said A. B., the said bankrupt, and by mail upon R X., Esq., attorney for the bankrupt, and on B. M., Esq., said trustee.

The United States of America

— District of —— ss. ---- Division

I, B. R., clerk of the District Court of the United States of America, within and for the division and district aforesaid, do hereby certify that the foregoing entry is truly taken and correctly copied from the journal of said court.

> In testimony whereof, I have hereunto set my hand and affixed the seal of said court at the city of ---, this --- day of --- A. D., 19-.

[Seal.]

B. R., Clerk.

L. Lat. 1

#### No. 118.

## Answer of Bankrupt to Rule to Show Cause for Contempt.

[Caption.] Now comes A. B., and in obedience to the rule issued by this court, says that the attachment for contempt ought not to issue against him for disobedience of the order of A. M., referee, for the following reasons:

First. He says that he can not comply with the order of this court, because he has not the bonds ordered turned over or sum of money ordered by said A. M. to be paid to him.

Second. That said order of said referee is not a lawful order within the contemplation of the bankruptcy act, or such an order, the disobedience of which would be punishable by attachment for contempt, and said order is not an order of this court.

Third. Said order is in effect a judgment directing the payment of money, and is not enforceable by proceedings in contempt.

Fourth. Section 29 of the bankruptcy act provides that such offenses, as those charged by the referee in his finding, shall be punishable only in the manner prescribed therein, to wit, by information or indictment.

Wherefore, said A. B. prays the court that said rule may be dismissed, and that he may be discharged.

X. & X.,

Attorneys for Bankrupt.

State of —,
—— County ss.
A. B., being first duly sworn, says that the allegations contained in his foregoing answer are true.

Sworn to and subscribed before me this —— day of —— A. D., 19—.

T. H.,

Fees —— cents.

Notary Public,
—— County, ——.

[Seal.]

#### No. 119.

#### Order to Take Additional Evidence on Rule to Show Cause.

[Caption.]

This cause coming on to be heard on the rule issued on the bankrupt and his answer, and on the findings and order of the referee filed herein, it appearing to the court that on this hearing the said bankrupt desires to offer additional testimony of F. H., O. H. and F. K., it is ordered that the referee take

said additional testimony, together with such evidence as the creditors of said bankrupt may offer in rebuttal, and that the referee report said evidence, together with whatever, if any, modification he may decide ought to be made of his former report and order [filed herein] upon consideration of the whole evidence taken before him in this matter. It is ordered that this entry be made as of the —— day of ——, 19—.

#### No. 120.

## Order Finding that Bankrupt has Concealed Assets (1).

[Caption.]

This cause coming on to be heard upon the motion filed herein on the — day of — 19—, for an order of the court requiring the said bankrupt, A. B., to show cause why he should not be attached for contempt for disobedience of the order of A. M., Esq., the referee herein, and upon the answer of said A. B., thereto, and upon the evidence, and was argued by counsel representing creditors of said bankr upt and by counsel representing said bankrupt; and on consideration whereof the court finds upon the evidence that said bankrupt does conceal, and has in his possession the sum of \$--- in money, and the further sum of \$--- face value United States bonds for money in said amount, all of which he refuses to deliver to said B. M., trustee appointed herein, in accordance with the order of said referee to that effect, and which order has been served upon said bankrupt more than twenty (20) days before said — day of —, 19-, that the said sums constitute property belonging to the estate of said bankrupt, and the court doth to said extent confirm said finding and order of said referee, and doth approve of the referee's order made on said A. B., on the —— day of ——. 19—; and the court does further find that said A. B. has not obeyed the said order of the referee to the extent of the

amounts here found to be in his possession, and that he is thereby guilty of contempt.

It is therefore ordered that said A. B., on or before the —— day of ——, 19—, pay to said B. M., trustee, the sum of \$——, and also deliver to him United States bonds face value of \$——, or in lieu thereof money in the sum of \$—— in money, and that he appear for further orders and proceedings herein in this court at —— o'clock a. m., on the —— day of ——, 19—.

It is ordered that for his appearance in court on the —day of —, 19—, at — o'clock a. m., to abide the further orders of this court in these proceedings, said A. B. execute bond in the sum of \$—— in the form, and with good and sufficient surety, as provided by law, to be approved of by the clerk of this court, and in default thereof he be committed to the custody of the marshal, and by him committed to the —— County Jail.

And said bankrupt by his attorney objects to said finding of said court and gives notice of his intention to appeal therefrom.

(1) This order must be made by the judge and not by the referee.

#### No. 121.

## Order Committing Bankrupt for Contempt in Not Obeying Order to Pay Over Assets (1).

[Caption.]

Now comes the said A. B., in accordance with his undertaking heretofore made in compliance with the order heretofore made on the —— day of ——, 19—, and it appearing from the report of B. M., trustee, and from the evidence, that said A. B. has wholly refused and neglected to perform and comply with the order of court made the —— day of ——, 19— and has wholly failed to pay and deliver said moneys and bonds or any of them to said trustee, the court

do find that he has been and is guilty of contempt. It is thereupon ordered and adjudged that he, said A. B., be confined in the county jail of the county of ——, State of ——, until he comply with said order and make said payment and deliveries as directed in said order of the —— day of ——, 19—, and that a warrant issue for such commitment.

(1) This order must be made by the judge and not by the referee.

#### No. 122.

Order of Referee Recommending Commitment for Contempt. In the District Court of the United States

For the — District of — In Bankruptcy.

In the matter of A. B. Co., et al.

vs.
E. B.,

Bankrupt.

I, J. S., one of the referees in bankruptcy of this court, do respectfully report that on the —— day of ——, I entered an order requiring F. B., to pay to E. M., Trustee in Bankruptcy in this cause, on or before 9:30 o'clock a. m., ——, the sum of \$—— which came to his hands as bailee or agent of the bankrupt, E. B., which sum said F. B. has not accounted for.

At the time of the entry of said order said F. B., was before me in person and by counsel, R. X., Esq. A copy of said order is filed herewith and made part hereof, marked No. 1.

I further certify that said F. B. has failed to comply with said order in whole or in part.

I therefore find that said F. B. is in contempt of court, and therefore recommend that he be punished for contempt and committed to prison until he shall have paid to the said trustee the said sum of \$——.

All of which is respectfully submitted. J. S., Referee in Bankruptcy.

#### No. 123.

# Order Committing Agent of Bankrupt for Contempt in Not Obeying Order of Referee to Pay Over Assets of Bankrupt.

In the District Court of the United States
For the —— District of ——.
[Caption.]

This cause coming on to be heard on the petition of W. T. for a review of the order of court entered herein by J. S., one of the referees of this court, requiring W. T. to pay over to E. M., Trustee in Bankruptcy of the bankrupt herein, and the certification of said referee as to the disobedience of said W. T. of said order and the recommendation of said referee that said W. T. be punished for his contempt of the order of this court, and the court being fully advised, it is hereby ordered that the said W. T., be committed for contempt of court as charged and confined in the jail of —— County until further order of this court.

#### No. 124.

### Commitment for Contempt.

In the District Court of the United States

For the —— District of ——.

—— Division.

In re

A. B., Bankruptcy.

The defendant A. B., —— having been adjudged guilty for contempt of court in failing to pay and deliver moneys and bonds or any of them to the trustee herein ——

Thereupon the court pronounced the following sentence, to wit: That the said A. B. be imprisoned in the jail of

County, State of — until he comply with the order of the — day of —, 19—, and make said payments and deliveries as directed in said order.

This, therefore, is to commend the marshal of said district to take the body of the said A. B. and commit the same to the said jail of —— County, —— pursuant to the above sentence.

Witness, the Honorable G. R., Judge of the District Court of the United States, this —— day of ——, A. D., 19—, and in the —— year of the Independence of the United States of America.

[Seal.] B. R.,

Clerk of the District Court of the United States —— District of ——.

#### No. 125.

## Order Purging A. B. of Contempt and Directing His Release from Jail (1).

[Caption.]

It appearing that the order herein made against the bankrupt A. B., and after failure to comply therewith is imprisoned in the jail of —— County, in the State of ——, has now been complied with, it is hereby ordered that said A. B. is purged of contempt for his disobedience to the order of court.

It is ordered that said A. B., upon payment of costs taxed at \$——, be now released and discharged from said imprisonment, and the marshal is hereby ordered to deliver a copy of this order to the sheriff of —— County, in the State of ——, who is hereby directed upon receipt thereof to release the said A. B. from his custody.

(1) This order must be made by the judge and not by the referee.

#### No. 126.

Rule to Show Cause Why Assignee for Creditors Should Not Pay Over Funds to Trustee in Bankruptcy (1).

[Caption.]

The President of the United States of America to L. C., assignee for the benefit of the creditors of A. B.:

You are hereby cited and admonished to be and appear before the District Court of the United States within and for the —— District of —— on the —— day of —— A. D., —— at 10 o'clock a. m., to show cause, if any you know or have, why you should not pay over and deliver to J. R., Trustee in Bankruptcy, the funds and assets of the estate of the said A. B. now in your possession or under your control. It is hereby ordered that the marshal of this district make legal service and return of this rule on or before the appearance day above named.

Witness, the Honorable G. R., United States District Judge for the —— District of ——, this —— day of ——, A. D., 19—, and in the —— year of the independence of the United States of America.

B. R.

Clerk of the District Court of the United States for the ——District of ——.

(1) This form can be used for the purpose of compelling the bankrupt or agent to pay over money. See Mueller vs. Nugent, 184 U. S. 1.

#### No. 127

## Order that the Assignee for the Benefit of Creditors Pay Over Funds to the Trustee in Bankruptcy.<sup>1</sup>

[Caption.]

This cause came on to be heard upon rule to show cause, etc., and was argued by counsel.

On consideration whereof it is hereby ordered that L. C., assignee for the benefit of the creditors of A. B., forthwith

pay over and deliver to J. R., Trustee in Bankruptcy of the estate of said A. B., all funds and assets of every description belonging to the estate of said A. B. now in his possession or subject to his control.

(1) See note to No. 126.

#### No. 128.

## Order for Assignee for Creditors to Account.

In the District Court of the United States

For the —— District of ——.

A. B., et al.

vs.

C. D. & Co.,

Bankrupt.

At —, in said district, on the —— day of —, A. D., 19—, before J. B., Referee in Bankruptcy.

Notice having been given, and no adverse interest appearing, it is hereby ordered that L. C., assignee for the benefit of the creditors of C. D. & Co., file with J. B., one of the referees of this court in bankruptcy, at his office, Rooms 1001-1005, Columbia Building, —, on or before —, at 9:30 o'clock a.m., a' detailed and itemized statement showing all the receipts and disbursements made by him of money and other assets belonging to the estates of C. D. & Co., together with all vouchers that he may have for any disbursements.

It is further ordered that said L. C. be and appear before the referee aforesaid in person on ——, at 9:30 o'clock a. m., for the purpose of making settlement of his accounts as assignee of the parties aforesaid.

Witness the Honorable G. R., Judge of said court, and the seal thereof, at ——, in said district, on the —— day of ——, A. D., ——.

[Seal.]

B. R., Clerk of Said Court.

#### No. 129.

## Response of an Assignee for Benefit of Creditors to a Rule to Pay Over Money. (1).

In the District Court of the United States
For the —— District of ——.

In the matter of
A. B. & Co., et al.,
vs.
C. D. & Co., D. G. and C. D.

Bankrupts

L. C. for response to the order herein to show cause why he shall not pay the Receiver in Bankruptcy herein the sum of \$—— shown in his report as having been paid Messrs. M. A., D. A. & J. G., and \$—— to Z. P. Esq., says that said sums were paid them respectively for services rendered him as his counsel whilst acting as assignee before any proceedings herein, as already appears in his report herein. He says further that he has no money or property or means of any kind with which to pay said money or any part thereof.

He respectfully submits to the court that he ought not to be compelled to pay said money herein.

This respondent says further that long before the petition in this proceeding was filed and before he had any knowledge, information or intimation that it was intended to be filed, and relying upon it that he would be permitted to wind up his trust under the deed of assignment for the bankrupts shown in the record in this action or proceeding, he filed his petition and brought action in the State court as appears in this record, which is still pending, and he is still subject to the jurisdiction and orders of said State court requiring him to settle his accounts there and to be responsible there for all his acts and doings under said deed of assignment.

He submits to this honorable court that this response be held sufficient and that the "show cause" order herein should be annulled or suspended until he is relieved from his present embarrassing position.

L. C.,

Subscribed and sworn to before me by L. C., June ——. My commission expires ——. A. S.,

Notary Public, — County, —.

(1) Taken from the record in Louisville Trust Co. vs. Cominger, 184 U. S. 18.

As to the right of attorneys for assignee in state court to pay for services rendered prior to bankruptcy, see Randolph vs. Scrugge, trustee, 190 U. S. 533; 10 Am. B. R. 1.

#### No. 130.

## Petition by a Trustee to Review an Order Allowing a Claim (1).

In the District Court of the United States

For the —— District of ——.

In the matter of the estate of

A. B.,

In Bankruptcy.

Bankrupt.

The petition of N. J. M., trustee of A. B., bankrupt, of the village of ——, respectfully represents:

First. That heretofore, to wit, on the —— day of ——, the said A. B., who before that time had been engaged in business at ——, was duly adjudged a bankrupt by an order of this court, and that afterwards your petitioner was chosen and elected trustee in the estate of A. B, and is now and has for some time past been acting as such trustee.

Second. That heretofore, to wit, on the —— day of ——, the S. T. Company, of ——, a corporation organized under the laws of the State of —— and carrying on business under the laws of the State of —— at ——, aforesaid, filed its claim against said estate for —— dollars and —— cents as a preferred claim against said estate for the amount claimed to be due under and by virtue of a certain chattel mortgage made

and executed by the said A. B. to said The S. T. Company, on the —— day of ——, and which said chattel mortgage it was claimed by said, The S. T. Company, was a lien upon the stock of goods, wares and merchandise received by the said trustee and by him converted into cash.

Third. That said, The S. T. Company, petitioned A. M., Esq., referee, in matter of said estate, that said claim be allowed as a preferred claim and that the said trustee should be ordered by the court to pay the same out of the assets of said estate in preference to other claims as a first lien thereon, and that your petitioner as trustee as aforesaid, on the —— day of —, filed his objections to the allowance of said claim, and afterwards the said matter came on to be heard before A. M., Esq., referee in said estate, and testimony was taken thereon before the said referee and by deposition and the matter submitted to him, and afterwards, on, to wit, the --day of —, the said referee made an order allowing the said claim of said The S. T. Company, against the estate of said A. B. to the amount of —— dollars and —— cents, together with costs amounting to —— dollars and —— cents as a preferred claim against the said estate, and ordering and requiring your petitioner as such trustee to pay said amount to said The S. T. Company, out of the moneys in his hands belonging to said estate.

Fourth. That your petitioner claims that the said chattel mortgage upon which said claim is based is void, and that said, The S. T. Company, is not entitled to enforce the same against the property purported to be covered thereby, and against the assets of said estate, and that such mortgage is illegal, fraudulent and void for the specific reasons set forth in his objections filed with said referee to the claim of said, The S. T. Company, to which he hereby makes reference.

Fifth. Your petitioner, therefore, avers that the ruling and decision of the said referee allowing said claim was error, and that no order should have been made by said referee allowing

said claim, and said referee should have made an order disallowing said claim, and holding said chattel mortgage void for the reasons set forth in the petitioner's objection thereto.

Sixth. That your petitioner desires a review by the Judge of this court of the order made by said referee, and filed this petition therefor; and he therefore prays that the error complained of and the questions of law and fact raised before the said referee and decided by him may be certified by the said referee to the Hon. G. R., District Judge; that he may review the order heretofore made and make and enter an order or direct the referee to make and enter an order holding and deciding the said chattel motgage to be illegal, fraudulent and void and that the same constituted no lien upon the property of said A. B. purporting to be covered thereby, and no lien against the assets in said estate in the hands of your petitioner, and disallowing said claim of said The S. T. Company.

And your petitioner ever prays. J. M., R. X., Trustee.

Attorney for Petitioner.

United States of America, — District of —, Division, County of —, ss.:

I. J. M., the petitioner mentioned and described in the foregoing petition, do hereby make a solemn oath that the statements therein are true according to the best of my knowledge, information and belief.

J. M.,

Petitioner.

Subscribed and sworn to before me this —— day of ——, A. D., ——. J. N.,

Notary Public, — County, —.

<sup>(1)</sup> The action of the referee is always subject to review by the judge of the court of bankruptcy. Gen. Ord. 27, B. A. 1898, sec. 38a. In any proceeding before a referee, a party dissatisfied with any order of the referee made in the course of such proceeding, may take the opinion of the judge in respect to such matter. The practice is provided for by General Order 27, and should be followed. In re Scott, 99 Fed. Rep. 404, 3 Am. B. R. 625, 2 N. B. N. 440.

#### No. 131.

Petition by an Assignee to Review an Order of a Referee on a Rule to Pay Over Money to Receiver in Bankruptcy (1).

For the — District of —. In the matter of vs.
C. D. & Co., D. G. and C. D.

Bankrupts.

In the District Court of the United States

Respectfully represents the petitioner. L. C., that during the course of the proceedings herein, before J. B., one of the Referees in Bankruptcy of this court, a rule was issued against the petitioner to show cause why he should not be compelled to pay to the receiver the sum of \$---; also another rule was issued against the petitioner to show cause why he should not pay the further sum of \$--- by him paid to M. A., D. A. & J. G., for services as counsel for him in his capacity as assignee under the general assignment under the State law; that your petitioner filed responses to both of said rules which responses having come on to be heard were adjudged by the said referee insufficient and said rules were made absolute. Your petitioner shows that said referee erred to his prejudice in issuing both of said rules, also in adjudging both of said responses insufficient, also in making both of said rules absolute.

Wherefore, your petitioner prays that the orders of said referee above set forth may be reviewed by the Honorable Judge of this court. L. C.,

By his Counsel, X. & X.

[Verification.]

(1) As to power of court to review orders of referees and the practice in such cases, see Gen. Ord. 27; Mueller vs. Nugent, 184 U. S. 1; Cunningham vs. Bank, 103 Fed. Rep. 932; Courier Journal Job Printing Co. vs. Brewing Co., 101 Fed. Rep. 699

#### No. 132.

## Petition to Review Order of Referee Disallowing Claim (1).

[Caption.]

To the Honorable A. C., Judge of the District Court of the United States for the —— District of ——.

The Petition of The D. M. Grocery Company, a corporation under the laws of ——, one of the creditors of said bankrupt, respectfully represents that on the —— day of ——— 1901, manifest error to the prejudice of complainant, was made by the referee in said matter in a finding and order disallowing and expunging the claim of said corporation against said bankrupt from the list of allowed claims upon the trustee's record in said case; and in ordering said corporation to pay as preferences received from said bankrupt the sum of \$——. The errors complained of are:

First. That the evidence adduced before said referee and set out in the agreed statement herewith submitted, shows that no preference in excess of subsequent credits given, were received by said corporation.

Second. Said referee erred in the method adopted for calculating preferences claimed to be within four months of bankruptcy in said case.

Third. Said referee erred in finding from the evidence that the dates of payment on the open account of said bankrupt with said corporation, were those dates shown by the books of the bankers of said bankrupt, Messrs. R., B. & Company.

Fourth. Said referee erred in finding that any payments made to said corporation by said bankrupt were preferences for any amount.

Fifth. Said referee erred in ordering said corporation to pay the sum of \$\_\_\_\_\_, or any sum at all, within five days from said date.

Sixth. Said referee erred in his conclusions of law from the evidence offered at said hearing.

Wherefore the D. M. Grocery Company prays that it may be decreed by the court to have its claim against the said bankrupt estate allowed for the full amount thereof, and that it be restored to all things lost by reason of the finding and order of the referee in said matter.

The D. M. Grocery Company, By R. X., Its Attorney.

[Verification.]

(1) See note to No. 130.

#### No. 133.

## Petition to Review Order of Referee to Pay to Trustee Money of Bankrupt (1).

The District Court of the United States for the —— District of ——. In Bankruptcy.

$$\left. \begin{array}{c} \textit{In re} \\ \text{A. B. \& Co. } \textit{et al.} \\ \textit{vs.} \\ \text{E. T.} \end{array} \right\} \text{ Petition for Review.}$$

Comes W. T., by counsel, and files herewith his petition for review of the order of the referee entered herein on ——, and says that said referee erred in ordering and adjudging as insufficient his response to the rule filed herein on ——; that said referee erred in adjudging that there came to the hands

of said W. T. as the agent of the bankrupt, on ----, the sum of \$---, being the net proceeds realized from the mortgage executed by the bankrupt upon his house and lot in the City of ---; that said referee erred in adjudging that there came to the hands of said W. T., as the agent of the bankrupt on —, the further sum of \$----, being the net proceeds from the sale of the merchandise sold to H. S.; that said referee erred in adjudging that said sums are the property of the bankrupt E. T., and belong to E. M., trustee in bankruptcy herein of said estate; that said referee erred in ordering that said rule be made absolute to the amount of said two sums aggregating the sum. of \$---; that said referee erred in ordering and requiring said W. T. to pay to E. M., trustee in bankruptcy in this cause on or before 9:30 o'clock on ----, the said aggregate sum of \$---, and said referee erred in entering said order on ----, a copy of which is filed herewith, that said order is erroneous and void, and said referee had no jurisdiction to enter same.

Wherefore, said W. T. prays that said order entered herein by the referee on ——, be reviewed by the Honorable Judge of the District Court of the United States for the —— District of ——, and that said order be adjudged erroneous and void.

X. & X., Attorneys for W. T.

(1) Taken from the record in Mueller vs. Nugent, 184 U. S. 1. See note to No. 130.

## No. 134.

## Petition for Review Order on Claims (1).

[Caption.]

And now comes the L. Trust Company, trustee in bankruptcy, of the bankrupts in the above styled proceeding, by R. Y., Esq., of counsel, and respectfully represents to the court that said trustee and the lawful creditors of the estate of said bankrupts whom said trustee represents, are aggrieved by the find-

ing of the Hon. A. M., referee herein, with reference to the following matters, to wit:

That the referee in his finding and decision, upon the exceptions of said trustee and of the creditors to the claim of D. L. & Son, erred to the prejudice of these petitioners, the said trustee and the lawful creditors of said bankrupts.

First. In not finding that the sum of \$\limes\$— had been paid to said D. L. & Son on their claim filed here, by E. F. & Co., endorsers of two \$\limes\$— notes included in and part of said claim of D. L. & Son.

Second. In not finding that said claim of D. L. & Son had been paid in full, as a preferential payment, out of the proceeds of the fraudulent sale of the remainder of the stock, fixtures, etc., of the bankrupt firm, to E. F. of said firm of E. F. & Co., as provided for in the written agreement between the three members of the bankrupt firm, read in evidence, and in finding that said preferential payment was only one-half of said claim of D. L. & Son, when in fact said claim was paid in full.

Third. In finding that only one-half of the claim of E. F. & Co. was paid as a preferential payment out of the profits of said fraudulent sale to E. F., when in fact said claim was paid in full as shown conclusively by the evidence in said proceeding.

Fourth. Because said referee erred in not disallowing each of said claims of D. L. & Son and E. F. & Co.

Wherefore said petitioners pray this honorable court to review the findings of the said receiver with reference to the matters hereinbefore set forth, and that the referee herein certify the said questions to the court for that purpose and that he send up with said certificate all of the testimony taken on said issues of said bankrupts' estate, etc.

The L. Trust Company,
Trustee in Bankruptcy.

R. Y., Attorney.

(1) See note to No. 130.

#### No. 135.

## Petition to Review Order Relative to Exemptions (1).

[Caption.]

Now comes E. B. and petitions to the Honorable A. M., Referee, for any order certifying to the Honorable G. R., Judge of the District Court of the United States for the —— District of ——, for review of all matters pertaining in and to the order entered herein on the —— day of ——, A. D. ——, relating to and finding against the claims of said E. B., as widow of said A. B., bankrupt, and respectfully represents that the errors complained of are as follows:

The court erred in not making an order, under Section 8 of the Bankruptcy Act:

First. That the trustee paid to said E. B. the exemptions heretofore demanded by her husband during his lifetime.

Second. That the trustee permit her to remain in her husband's mansion house and in possession of his household property for a period of one year, unless dower is sooner assigned her in said mansion house.

Third. That the trustee pay to her from the assets of said estate the allowance provided for her under Sections 6040 and 6041 of the Revised Statutes of ——, and heretofore fixed by the Probate Court of —— County, ——, at \$——.

Fourth. That said trustee permit her to retain as exempt such part of the assets of said estate as are exempt under Section 6038 of the Revised Statutes of ——.

Fifth. That said trustee allow and pay to her such other exemptions as she is entitled to receive under the Revised Statutes of \_\_\_\_\_.

E. B.,

By R. Y., her Attorney.

(1) See note to No. 130.

#### No. 136.

### Certificate by Referee to Judge (1).

(Official Form No. 56.)

In the District Court of the United States for the —— District of ——.
In the matter of Bankrupt.  In Bankruptcy.
I, —, one of the referees of said court in bankruptcy

do hereby certify that in the course of the proceedings in said cause before me the following question arose pertinent to the said proceedings: [Here state the question, a summary of the evidence relating thereto, and the finding and order of the referee thereon.]

And the said question is certified to the judge for his opinion thereon.

Dated at \_\_\_\_, the \_\_\_\_ day of \_\_\_\_, A. D. 18\_\_.

Referee in Bankruptcy.

(1) See note to No. 130.

#### No. 137.

## Certificate of Referee to Judge (1).

At ——, in said district, on the —— day of ——, A. D. ——, before A. M., Referee in Bankruptcy.

I, A. M., one of the referees of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me the following question arose pertinent to said proceedings:

The Third National Bank, of \_\_\_\_, filed a claim evidenced

by one promissory note for \$---- and also another promissory note for \$---, and asserted a claim to be subrogated to the rights of the mortgagees under three mortgages, to wit, one dated April 15th, 1892, another dated February 19th, 1894, and another dated January 12th, 1897. Prior to the execution of any of said mortgages the bankrupt had also executed to the S. Trust Company a mortgage to secure an issue of \$--of bonds, of which \$--- were negotiated and have ever since remained outstanding. Under the provisions of the charter of the bankrupt I find that said bankrupt was limited in its power to execute a mortgage to the extent of \$---. I also find that the Third National Bank, through its managing officer, E. C., cashier before making any of said loans had knowledge of the existence of said mortgage to the S. Trust Company. though it is testified by E. C., and not denied, that about the time the Third National Bank made its loans he was informed that the said mortgage to the S. Trust Company was for \$----. As a matter of law I find that the information which said E. C. had of the existence of said mortgage was sufficient to put him upon inquiry as to the amount thereof.

I further find that the notes of \$--- and \$--- filed by said Third National Bank are renewals of various loans made by said Third National Bank to the bankrupt, beginning April 16th, 1892.

The mortgage to the S. Trust Company outstanding amounted to \$49,000, and I have allowed a lien to the Third National Bank by way of subrogation to the rights of the mortgages in the three mortgages dated April 15th, 1892, February 19th, 1894, and January 12th, 1897, to the extent of \$\_\_\_\_\_, making together the sum of \$\_\_\_\_\_, the limit prescribed by the charter of the bankrupt. The balance of the claim of the Third National Bank, to wit, \$\_\_\_\_\_, I have allowed as a general claim.

The Third National Bank has filed a petition for review of the foregoing ruling. And the said question is certified to the Judge for his opinion thereon.

Dated at — the — day of —, A. D. —

A. M..

Referee in Bankruptcy.

I herewith transmit the testimony pertaining to the claim of said Third National Bank; also the proof of claim of said bank with the mortgages relied on by it attached thereto, and also a memorandum of the reasons for my finding.

A. M.,

Referee.

(1) See note to No. 130.

#### No. 138.

## Certificate of Referee to Judge on Allowance of Claim (1). [Caption.]

I, A. M., one of the referees of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me the question came up as to the allowance of the claim of the S. Trust Company, a corporation organized under the laws of the state of —— as a preferred claim against said estate, which said claim has been allowed, and that on account of the allowance thereof a petition to the court has been made on behalf of the trustee asking for a review of the order of said allowance and the question of the allowance of said claim is certified to the Judge for his opinion thereon.

I return herewith as the record the following items:

First. Proof of claim of S. Trust Company filed ——.

Second. Objections as to the allowance of said claim made on behalf of the trustee, filed ——.

Third. A further itemized statement of said claim, filed

Fourth. Depositions taken in favor of said claim. filed

Fifth. Depositions of E. F. in behalf of said claim.

Sixth. Testimony introduced on the part of the estate in said claim.

I also return herewith an order made in respect to said claim and the petition for a review of said order, all being made a part thereof.

Dated at —— the —— day of ——.

A. M., Referee.

(1) See note to No. 130.

#### No. 139.

## Certificate of Referee to Judge on Denying Lien on Realty (1).

[Caption.]

I, A. M., one of the Referees in Bankruptcy of said court, do hereby certify that in the course of the proceedings in said cause before me the following question arose pertinent to said proceedings:

The First National Bank of — filed a note for \$—claiming a lien upon the plant and realty of the bankrupt by way of subrogation to the rights of A. S., under two mortgages, dated April 15th, 1892, and February 19th, 1894, executed by the bankrupt to said A. S., and others.

I found that said bank is not entitled to the lien claimed, and a petition for review has this day been filed. In the order complained of I also passed upon claims of E. F. and Third National Bank. A petition for review has heretofore been filed by the Third National Bank, and the mortgages in question have been sent to the court with my reasons for the whole order.

And the said question raised by the First National Bank is also certified to the Judge for his opinion thereon.

Dated at ——, the —— day of ——, A. D. ——.

A. M.,

Referee in Bankruptcy.

(1) See note to No. 130.

#### No. 140.

### Certificate of Referee on Finding Creditor Held a Preference (1).

[Caption.]

- I, A. M., one of the referees of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause, before me the following questions arose pertinent to the said proceedings:
- E. F. & Co. filed before me proof of debt for \$---, and also another claim verified by the assignee of E. F. & Co. for \$---.
- D. L. & Son filed a claim for \$——, and another claim for \$——, which includes and is a duplication of said claim of \$——.

The trustee, R. B., and S. G., filed exceptions to said claims, averring that the holders thereof had received preferences.

I found that E. F. & Co. and D. L. & Son had received preferences to the amount of fifty per cent. of their claims and ordered that they elect whether or not they will surrender the preferences received by them or have the claims filed as aforesaid disallowed. To that order and finding said E. F. & Co. and D. L. & Son have filed petitions for review, and the trustee also filed a petition for review.

Said claims, also the exceptions aforesaid, also the order and finding thereon, also said three petitions for review, are all filed herewith and made part hereof, marked exhibits 1, 2, 3, 4, 5, 6, 7, 8 and 9.

A summary of the evidence taken before me and relating to the question involved is also attached hereto and marked exhibit "Summary of Evidence." An opinion giving my reasons for the finding and order aforesaid is also made part of this certificate, marked exhibit "Opinion of Referee."

And the said questions are certified to the Judge for his opinion thereon.

(1) See note to No. 130.

#### No. 141.

### Motion to Correct Journal Entry.

Now comes the C. D. Company, a creditor of said bankrupt, and respectfully represents that in the matter heard by the court on the 14th day of February, 1902, on certification from the referee disallowing and expunging the claim of said creditor, the written finding and order of the court in said proceedings was filed in said court and made part of its records on the 6th day of March, 1902, at 8 o'clock a. m.; that a journal entry thereof was filed by said referee in said court on the 28th day of March, 1902, and by the clerk was made part of the records as of said date, to wit; March 28, 1902.

Wherefore, said creditor prays the court for an order correcting the record in said matter, and directing the clerk to make the record of said entry as of the date March 6th instead of the date March 28th, 1902.

The C. D. Company, By R. Y., Its Attorney

#### No. 142.

### Order Confirming Order of Referee.

In the District Court of the United States

For the — District of —.

A. B.,

vs.

C. D. & Co.,

\*This cause coming on to be heard on the petition of L. C., for review of the order of court entered herein by J. B., one of the referees of this court, requiring L. C. to pay over to the E. F. Trust Company, Trustee in Bankruptcy herein, the sums of \$—— and \$—— and the court being fully advised, delivered a written opinion which was filed herein, and on —— day of ——, and in pursuance of said written opinion, it is considered ordered and decreed by the court that said order of the

referee is hereby confirmed and the petition for review filed by said L. C. on the —— day of —— is dismissed and it is for this adjudged, ordered and decreed by the court that said L. C. pay to said E. F. Trust Company, trustee, the said sums of \$—— and \$—— on or before —— day of ——.

#### No. 143.

## Order Reversing Order of Referee Disallowing Claim

In the District Court of the United States

For the —— District of ——.

In the matter of F. H.,

doing business as F.

H. & Son,

Bankrupt

In Bankruptcy.

--- Division.

This day this cause came on for hearing on the petition of The D. M. Grocery Company for review of the decision of the Referee in Bankruptcy disallowing and expunging the claim of said The D. M. Grocery. Company, the certificate of the referee as to the questions presented and summary of the evidence relating thereto, and the finding and order of the referee thereon, was argued by counsel and submitted to the court and on consideration thereof the court find that the decision of the referee in refusing to allow and in expunging the claim of said The D. M. Grocery Company was erroneous, and claim of said The D. M. Grocery Company, should have been allowed, as proved by it, as a valid claim in the sum of - dollars. It is, therefore, ordered, adjudged and decreed that the action of the Referee in Bankruptcy in disallowing said claim be and the same is hereby reversed and this proceeding is hereby remanded with directions to the referee to allow the claim of said The D. M. Grocery Company, in the sum of -(\$----) dollars, to which finding, order, judgment and decree, B. F., Trustee in Bankruptcy of F. H., doing business as F. H. & Son, at the time excepted, and gave notice of his intention to appeal this matter to the Circuit Court of Appeals for the ——Circuit.

#### No. 144.

## Decree Confirming Order of Referee with Reference to Election of Trustee

[Caption

This matter came on to be heard upon the petition to review the findings and decision of the referee in the matter of the election of a trustee; upon consideration whereof, the court approves and confirms the findings of the referee in said behalf.

#### No. 145.

#### Order Marshalling Liens.

[Caption.]

,.**\*** 

This day this cause coming on to be heard upon the petitions for review filed herein by the Third National Bank, the First National Bank and E. F., asking a review of the orders of the referee herein, upon the allowance of their respective claims as preferred, and counsel for said parties having been heard, and the court being sufficiently advised, it is therefore ordered and adjudged that the finding of the referee herein be, and the same is hereby disapproved in so far as same denied to E. F., a lien upon the property of the bankrupt for her said debt, and it is now ordered and adjudged that said E. F. has a prior lien for \$--- with interest thereon from the date of adjudication herein until paid upon the property of the bankrupt described in the mortgage of March 9th, 1892, superior to the Third National Bank, but inferior to the claim of the Columbia Finance & Trust Company, trustee, for the first mortgage bondholders.

It is also ordered and adjudged that the finding of the referee upon the claim of the Third National Bank is erroneous, and The foregoing amounts thus allowed priority to E. F. and the Third National Bank, together with the —— (\$——) dollars first mortgage debt to the R. Trust Company, trustee, will make up —— (\$——) dollars and leave nothing to satisfy any preference, which might otherwise be available to the First National Bank, and it is adjudged that the claim of said First National Bank, against said bankrupt's estate be and the same is allowed for the sum of —— dollars and —— cents (\$——) as a general claim against the estate of the bankrupt, and that said First National Bank has no lien to secure its said debt.

It is also ordered and adjudged by the court that the finding of the referee herein upon the limit of mortgaged indebtedness that could be incurred by said bankrupt, placing said limit at — (\$——) dollars, and that all mortgages issued above this limit of —— (\$——) dollars, were and are under the law of ——, void, be and the same is now confirmed, and it is adjudged that all said mortgages in excess of —— (\$——) dollars, executed by said bankrupt were and are under said law of ——, void and of no effect.

#### No. 146.

## Decree on Petition to Review Order Relative to Widow's Exemptions.

[Caption.]

On this — day of —, A. D. —, this cause came on to be heard on the petition of E. B., widow of the bankrupt for review of an order heretofore made on the — day of —, A. D. —, by A. M., referee, on her petition before said referee for the allowance of certain exemptions under the laws of the state of —, and due notice of said hearing having been given to all parties in interest, the court finds that said petitioner, E. B., widow of said bankrupt, is entitled to special exemptions of household goods and furniture, under section 6038 of the Revised Statutes of — and that she is entitled to the allowances mentioned under section Nos. 6040 and 6041 of the Revised Statutes of —, and is entitled to remain in the mansion house of her husband for the period of one year, unless dower is sooner assigned her therein.

It is therefore ordered:

First. That the trustee permit the widow, E. B., to remain in the mansion house for the period of one year, unless dower is sooner assigned to her therein.

Second. That the trustee pay to her the allowances made to her under sections 6040 and 6041 of the Revised Statutes of —, to wit: The sum of \$——, provided there shall be so much in his hands after paying costs and any mortgage to which the widow was a party, out of funds arising from the sale of mortgaged premises, or any property belonging to said estate.

Third. That the trustee permit her to retain such parts of the assets of said estate as are mentioned in Section 6038 of the Revised Statutes of ——.

Fourth. That nothing be paid or turned over to H. S., executor of the estate of A. B., on account of exemptions claimed by said A. B. in the proceedings in bankruptcy.

It is further ordered that the decision and order of A. M., referee, be and is so far overruled to the extent that it is inconsistent with the above findings of the court.

#### No. 147.

## Ancillary Order to Pay Funds of Bankrupt to a Trustee Appointed by Another District Court (1).

[Caption.]

Whereas, it appears that Solis V. Peiser, trading as Peiser & Co., was adjudicated a bankrupt by the District Court of the United States for the Southern District of New York on the 9th day of November, 1901, and that Theodore M. Taft, of New York, was duly appointed receiver of said bankrupt; and

Whereas, said Theodore M. Taft has presented a petition to this court asking for its assistance in enforcing the orders of the District Court of the United States for the Southern District of New York in proceedings ancillary to the said bankruptcy, and in aid thereof:

Now, therefore, this 2d day of April, A. D. 1902, on hearing of the said petition, and the answer of the Union Trust Company of Philadelphia and W. J. Clark, its Treasurer, as filed thereto, it is

Ordered and decreed that the Union Trust Company of Philadelphia do pay over, within ten days from the date hereof, to said Theodore M. Taft, receiver of Solis V. Peiser, trading as Peiser & Co., the above bankrupt, the sum of \$350.93, being the amount on deposit with said the Union Trust Company to the credit of said Peiser & Co. on November 9, 1901, the date of the said adjudication in bankruptcy, together with any interest on said deposit as the same is allowed by the said trust company from said date, or show cause why said payment should not be made.

(1) This order was entered in the District Court of the United States for the Eastern District of Pennsylvania and is taken from in re Peiser, 115 Fed. Rep. 108.

### No. 148.

# Order on Rule to Show Cause Against Bankrupt to Pay Money to Trustee, Insanity of Bankrupt.

District Court of the United States,

——District of ——.

- This case has been heard upon the question of the adoption of the referee's recommendation to require the bankrupt E. B. to pay to the trustee herein the sum \$---, money realized from the sale of the stock of merchandise and from the mortgage described in the papers, or to punish him for contempt in case he fails to so pay, the response of said bankrupt filed thereto and the suggestion filed by counsel as to the insanity of said bankrupt, evidence having been heard by the court as to the present condition of mind of said E. B., and the court being fully advised, delivered a written opinion herein, which is ordered to be filed, and pursuant to which it is considered by the court that the said E. B. is not now in such condition of mind as to make him properly subject to an order punishing him for contempt. It is therefore ordered that said E. B. be permitted to go hence without day, but the trustee of said E. B., in bankruptcy has leave again to bring the subject to the attention of the Referee in Bankruptcy, should development or change of condition in said E. B.'s mind make it in his judgment proper.

#### No. 149.

Bill in Equity to Recover a Preference and for an Injunction (1).

The District Court of the United States for the — District of —.

W. H., Trustee in Bankruptcy of A. B. and C. D., late partners as A. B. & Co.

vs.

E. F.

To the Honorable G. R., Judge of the District Court of the United States in and for the —— District of ——.

W. H., trustee in bankruptcy of A. B. and C. D., co-partners as A. B. & Co., brings this his bill of complaint against E. F. of ——, a citizen of the state of ——, residing at —— in said state.

Your orator complains and says that the said A. B. and C. D., co-partners, doing business at ——, in the state of ——, under the style of A. B. & Co., were by the District Court of the United States in and for the —— district of ——, adjudged bankrupts on the —— day of ——, 19—, and that this plaintiff was duly appointed trustee in bankruptcy of the said A. B. and C. D., co-partners as A. B. & Co., by the said District Court on the —— day of ——, 19—, and that he duly qualified and entered upon the performance of his duties as such trustee and is still acting as such trustee.

Your orator further says that he is informed and believes that on or about the —— day of ——, 19—, said A. B. and C. D., well knowing at the time that said firm was insolvent and unable to pay its creditors in full and with intent to prefer the defendant E. F. as a creditor of the said firm of A. B. & Co., and with the further intent to defraud the other creditors of said firm and in violation of an Act of Congress to establish a uniform system of bankruptcy in the United States, did withdraw from the funds of said firm the sum of \$——

and did transfer and pay the same to the said E. F. on the day aforesaid, and that he, the said E. F., at that time had reason to believe and to know that said firm was insolvent and that said payment to him was for the purpose of preferring him as a creditor of said firm.

Your orator further complains and says that he is informed and believes that said E. F. is insolvent and has no money or property in his own right and that unless restrained from so doing, will dispose of said funds and will be unable to pay over the same to this plaintiff and that said funds will be lost to the estate of the said bankrupts.

Wherefore your orator prays the court to now grant a preliminary injunction restraining and enjoining the said E. F. from transferring, paying over or in any way disposing of all or any part of said \$—— until further order of this court, and that he may be decreed to hold said funds in trust for and may be required to account for and pay over the same to this plaintiff, and for such other and further relief as may be just and proper in the premises.

May it please your honors to grant unto this plaintiff a writ of subpœna to be directed to the said E. F., thereby commanding him at a certain time and under a certain penalty personally to appear before this honorable court and then and there full, true, direct and perfect answer make [but not under oath] to all and singular the premises and further to stand to and perform and abide such further order, direction and decree therein as to this honorable court shall seem meet.

W. H.,

Trustee in Bankruptcy.

X. & X.,

Attorneys for Plaintiff. [Verification.]

(1) The District Court is given concurrent jurisdiction with any State Court for the purpose of recovering property by the trustee under Sec. 60b, Sec. 67e and 70e of the Bankrupt Act of 1898. Act of Feb. 3, 1903, Sec. 8, amending Sec. 23 of the Bankrupt Act of 1898, and Act 9 of June 25, 1910, 36 Stat. at L. 836.

The suit in this class of cases must be plenary. Louisville Trust Co. vs. Comingor, 184 U. S. 18; Marshall vs. Knox, 16 Wall. 556. It may be either a suit at law or in equity, as the case may require.

### No. 150.

## Petition for Removal of Trustee (1).

(Official Form No. 52.)

In the District Court of the United States for the —— Dis	•
trict of ——.	
In the matter of In Bankruptcy.	
Bankrupt.	

To the Honorable ——.

Judge of the District Court for the —— District of ——:

The petition of ——, one of the creditors of said bankrupt, respectfully represents that it is for the interest of the estate of said bankrupt that ——, heretofore appointed trustee of said bankrupt's estate, should be removed from his trust, for the causes following, to wit: [here set forth the particular cause or causes for which such removal is requested.]

Wherefore —— pray that notice may be served upon said ——, trustee as aforesaid, to show cause, at such time as may be fixed by the court, why an order should not be made removing him from said trust.

(1) Gen. Order 13.

# No. 151.

# Notice of Petition for Removal of Trustee (1).

(Omcial Form No. 53.)
In the District Court of the United States for the — Dis
trict of ——.
In the matter of
In Replementary
Bankrupt.
Danki upt.
At on the day of A D to
At ——, on the —— day of ——, A. D. 19—. To ——,
· ·
Truste of the estate of ——, bankrupt:
You are hereby notified to appear before this court, at —
on the —— day of ——, A. D. 18—, at —— o'clock —
m., to show cause (if any you have) why you should not b
removed from your trust as trustee as aforesaid, according t
the prayer of the petition of —, one of the creditors of sai
bankrupt, filed in this court on the —— day of ——, A. I
19—, in which it is alleged [here insert the allegation of the
petition].
Clerk.
(1) Gen. Order 13.
No. 152.
Order for Removal of Trustee (1).
(Official Form No. 54.)
'In the District Court of the United States for the — Dis
trict of ——.
In the matter of
————— In Bankruptcy.
Bankrupt.
<del></del>
Whereas, ——, of ——, did, on the —— day of ——, A. I

19—, present his petition to this court, praying that, for reasons therein set forth, ——, the trustee of the estate of said ——, bankrupt, might be removed:

Now, therefore, upon reading the said petition of the said —— and the evidence submitted therewith, and upon hearing counsel on behalf of said petitioner and counsel for the trustee, and upon the evidence submitted on behalf of said trustee,

It is ordered that the said —— be removed from the trust as trustee of the estate of said bankrupt, and the costs of the said petitioner incidental to said petition be paid by said ——, trustee [or, out of the estate of the said ——, subject to prior charges].

Witness the Honorable ——, judge of the said court, and the seal thereof, at ——, in said district, on the —— day of ——, A. D. 19—.

[Seal of the court.] Clerk.

(1) Gen. Order 13.

#### No. 153.

## Bankrupt's Petition for Discharge. (1).

	(Official Form N	Vo. 57.)
<del></del>	)	
In the matter of		
	In Bankruptcy.	
Bankrupt.		
To the Honorable	·	

Judge of the District Court of the United States for the District of ——:

—, of —, in the county of —, and state of —, in said district, respectfully represents that on the — day of —, last past, he was duly adjudged bankrupt under the

Acts of Congress relating to bankruptcy; that he has duly surrendered all his property and rights of property, and has fully complied with all the requirements of said acts and of the orders of the court touching his bankruptcy.

Wherefore he prays that he may be decreed by the court to have a full discharge from all debts provable against his estate under said bankrupt acts, except such debts as are excepted by law from such discharge.

Dated this — day of —, A. D. 19—.

Bankrupt.

#### ORDER OF NOTICE THEREON.

District of —, ss.

On this —— day of ——, A. D. 19—, on reading the foregoing petition, it is

Ordered by the court that a hearing be had upon the same on the —— day of ——, A. D. 19—, before said court, at ——, in said district, at —— o'clock in the ——noon; and that notice thereof be published in ——, a newspaper printed in said district, and that all known creditors and other persons in interest may appear at the said time and place and show cause, if any they have, why the prayer of the said petitioner should not be granted.

And it is further ordered by the court that the clerk shall send by mail to all known creditors copies of said petition and this order, addressed to them at their places of residence as stated.

Witness the Honorable —, judge of the said court, and the seal thereof, at — in said district, on the — day of

—— hereby depose, on oath, that the foregoing order was published in the —— on the following —— days, viz.:

On the —— day of ——, and on the —— day of ——, in the year 19—.

District of ——.

Personally appeared —, and made oath that the foregoing statement by him subscribed is true.

Before me,

[Official character.]

I hereby certify that I have on this —— day of ——, A. D. 19—, sent by mail copies of the above order, as therein directed. ——,

Clerk.

(1) As to who may file a petition for discharge, when and where the petition is filed see B. A. 1898, sec. 14 Gen. Ord. 31.

## No. 154.

## Notice to Attorney for Bankrupt with Reference to Discharge

R. X. Esq.,

Attorney at Law.

Dear Sir:—In the matter of A. B., No. —— in bankruptcy, the petition for discharge and check for \$——, advanced fees received. Enclosed herewith you will find receipt for said fees, and also notice for insertion in the newspaper designated. Please see that the notice is promptly inserted in the said newspaper, and that proof thereof, with payment receipted, and the final oath are filed with the clerk before the return day. Neither the bankrupt nor his attorney need be present on the return day. The creditors are allowed ten days beyond return day in which to file specifications. If no appearance in opposi-

tion to discharge has been entered before return day or specifications filed within the ten days, the decree of discharge will be made, and certificate thereof mailed you. Please acknowledge receipt of notice for publication.

Yours Respectfully,

B. R., Clerk

#### No. 155.

# Notice of Application for Discharge in Bankruptcy.

The District Court of the United States

For the —— District of ——.

—— Division.

No. ——.

In the matter of A. B.,

Bankrupt.

Notice is hereby given that A. B., having on the —— day of —— been duly adjudged a bankrupt in the above entitled cause, has filed his petition for a discharge as a bankrupt, and the same will be heard by said court on the —— day of ——, at 10 o'clock in the forenoon, at the United States Court room in ——, at which time and place/all creditors and other persons in interest may appear and show cause, if any they have, why the prayer of said petition should not be granted.

B. R., Clerk of Said Court.

## No. 156.

## Proof of Publication.

For The —— District of ——
—— Division.
In the matter of A. B., Bankrupt. State of ——.
County of ——, ss:
T. G., of said city of ——, County of ——, State of ——
being first duly sworn, deposes and says that he is the principal
clerk in the office of the — Times Co., publishers of the Times, a daily newspaper in the said city, that a notice to creditors in the above entitled bankruptcy matter, of which the armexed printed slip taken from the said newspaper is a copy was inserted and published therein on the — and — day of —, A. D. —.  Subscribed and sworn to before me this — day of — F. C  Notary Public.
[Seal.] — County, —
[Seal.] — County, —
No. 157.  Specification of Grounds of Opposition to Bankrupt's
[Seal.] —— County, ——  No. 157.  Specification of Grounds of Opposition to Bankrupt's Discharge.

party interested in the estate of said ——, bankrupt, do hereby oppose the granting to him of a discharge from his debts, and for the grounds of such opposition do file the following specification: [Here specify the grounds of opposition.] (2)

Creditor.

### No. 158.

## Specifications of Grounds of Opposition to Discharge.

The District Court of the United States For the —— District of ——.

In the matter of the Bankruptcy of

A. B.,

Bankrupt.

Now comes E. F., G. H. and J. K., creditors of the said bankrupt and object to the discharge of said bankrupt for the following reasons:

First. That while a bankrupt he concealed from the trustee the sum of \$——, being property belonging to his estate in bankruptcy, and he concealed the further sum of \$—— from the trustee, being property belonging to his said estate in bankruptcy.

Second. That under oath he stated in the schedules attached to his petition in bankruptcy that he had no assets, whereas, and in fact, the assets consisted of \$——, at least.

Third. That while under examination under oath before the referee, he falsely stated and testified that said \$—— did not belong to him, but was the property of his wife, consisting of a loan to her by her brother A. G., whereas, and in fact said \$—— was and constituted his property.

Fourth. That while under examination under oath before the referee herein, he made numerous statements, too numerous to be embodied in these specifications, but are more fully set forth in the transcript of the evidence in this court by the trustee in his report, such statements were knowingly false when made.

> Y. & Y., Attorneys for Creditors.

#### No. 159.

## Order Referring Petition for Discharge to Referee (1).

The petition of said bankrupt praying that he may be discharged from all his debts pursuant to the acts of Congress relating to bankruptcy coming on for hearing on this day pursuant to orders herein the 26th day of January, 1901, now in accordance with Section 3, No. XII, General Orders in Bankruptcy and no objections or specifications having been filed in opposition thereto, the matter of said petition is hereby referred to A. M., one of the referees in bankruptcy of this court, at the city of ——, to ascertain and report to the court the facts relating to said petition, and the rights of said petitioner to a discharge under the provision of said act.

Witness the Honorable G. R., Judge of said court, and the seal thereof, at ——, in said district, this —— day of ——, A. D. ——.

B. R., Clerk of Said Court.

<sup>(1)</sup> A reference may be made to referee after specifications have been filed to report, but the judge must make the order of discharge. Bank. Act of 1898, sec. 14l.

#### No. 160.

# Order Referring Specifications in Opposition to Discharge to Referee.

[Caption.]

At the city of ——, in said district, this —— day of —— 191—, —— District of ——, ss.

And now, to wit, this —— day of —— 191— the specifications of objection to the discharge of said bankrupt filed by E. F., of ——, a party interested, are referred to A. M., referee in bankruptcy, at —— as a Special Master, to take the testimony and make report thereof to the court, and of his findings of fact, together with his recommendation in favor of, or against, said discharge; said referee to be entitled to receive for his services five dollars (\$5.00) for each day actually spent in hearing such reference and preparing his report; such sum to be chargeable in the first instance to the party opposing the discharge; and indemnity may be demanded by the referee before proceeding with the hearing.

## No. 161.

## Referee's Report on Petition for Discharge.

To the Honorable G. R., Judge of the District Court of the United States for the —— District of ——:

In accordance with an order of your honorable court whereby I was directed to ascertain and report to the court the facts relating to the petition of the said bankrupt for his discharge and the right of said petitioner for a discharge under the provisions of the bankrupt act, I do hereby report that said bankrupt's petition to be adjudicated bankrupt was filed on the —— day of ——, and that he was at the time of filing such petition a resident of ——, in the County of ——, in said district.

And I do further report that said bankrupt has in all things conformed to the requirements of said act and that so far as the papers on file with me and the proceedings had before me show, he has committed none of the offenses and done none of the acts prohibited in subdivision B, section 14 of said act and that in my opinion he is entitled to his discharge.

And I do further report that there are assets in said bankrupt's estate and that a trustee has been appointed, that the estate is unsettled and that my disbursements have been provided for.

Dated this — day of — A. M, Referee.

#### No. 162.

## Final Oath of Bankrupt.

In the District Court of the United States,

For the —— District of ——.

In the matter of A. B.,
Bankrupt.

Bankrupt.

District of ——, ss:

I, A. B., of —, in the county of —, and State of —, the bankrupt above named, upon my oath, do hereby declare that, on petition filed by [or against] me, I was duly adjudged a bankrupt by the decree of the court made on the —— day of —— A. D. 191—, under and by virtue of an act of Congress entitled "An Act to Establish a Uniform System of Bankruptcy Throughout the United States," approved the first day of July, 1898; that I have not knowingly and fraudulently concealed, while a bankrupt, and am not now concealing from trustee, any of the property belonging to my estate in bankruptcy; that I have not knowingly and fraudulently made a false oath or account in, or in relation to, any proceeding in bankruptcy; that I have not knowingly and fraudulently pre-

sented under oath any false claim for proof against any estate in bankruptcy, or used any such claim in composition, either personally or by agent, proxy or attorney; and that I have not knowingly or fraudulently extorted, or attempted to extort any money or property from any person as a consideration for acting, or for forbearing to act in bankruptcy proceedings; that I have not committed any of the offenses punishable by imprisonment, as provided in said act, nor have I, with fraudulent intent to conceal my true financial condition and in contemplation of my bankruptcy, destroyed, concealed, or failed to keep books of account or record from which my true condition might be ascertained; nor have I done, suffered, or procured to be done, or been privy to any act, matter or thing specified in the said act of Congress as a ground of withholding my final discharge thereunder, or as invalidating such discharge if granted.

Subscribed and sworn to before me this —— day of —— A. D. 191—, at —— in said district,

A. B. B. R., Clerk of Said Court.

(1) Oaths required by the Act, except upon hearings in court, may be administered by referees and by officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the state where the same are to be taken. Bankruptcy Act of 1898, Chap. 4, sec. 20.

This oath should not be administered by an officer who is the attorney for the bankrupt.

Bank. Act of 1898. Sec. 14 B (1) and (2). Sec. 29 B (1), (2), (3), and (5).

# No. 163.

# Clerk's Memoranda of Bankrupt's Petition for Discharge.

In the District Court of the United States,  For the —— District of ——.
In the matter of A. B., Bankrupt. No. — In Bankruptcy.
Residence of bankrupt ——. Name and address of attorney ——. Petition for adjudication—date of filing ——. Voluntary or involuntary ——. Adjudication—date of ——. Examination of bankrupt—referee's certificate of [Rule 16
(b)] —.
Certified list of creditors who have proved their claims
[Rule 16 (b)] ——. Final oath [Sec. 14 (b) (1) and (2); Sec. 29 (1) (2) (3)
(4) and (5)] —.
Fees of clerk on petition for discharge [Filing fees—Rule
20 (3) and (5)] ——.
Application for discharge [Sec. 14 (a); Rule 14 (a) and
(c) and Form 57] —.
Hearing thereon [Rule 12 (3) G. O.]—date of ——.
Notice by clerk to creditors [Sec. 58 (a) (2) and (b) and
(c) Form 57]—date ——.
(1) Names on schedules [Sec. 58 (a)] ——.
(2) Names on proofs of claims [Sec. 58 (a)] —.
Newspaper designated [Sec. 28 (a); Sec. 58 (b)]—name
of ——.
Publication—[See General Provisions, Rule 37 G. O.] ——. Proof of publication—[N. B.—Correct name; printed notice
attached; proof sworn to; bill receipted.]  Date of last publication [10 days before hearing] ——.
Specifications against discharge—date for filing [10 days from hearing] —.

Appearance in opposition to discharge [Rule 32 G. O.]—date of ——.

Disposition of same [Rule 12 (3) G. O.] ——.

Specifications of objection to discharge [Rule 32 G. O. ——.

See Form 58] ——.

Disposition of same [Rule 12 (3) G. O.] ——.

Referee's fees—if paid [Rule 20] ——.

Memoranda:——.

### No. 164.

## Discharge of Bankrupt.

(Official Form No. 59.)

District Court of the United States, — District of —. Whereas, —, of —, in said district, has been duly adjudged a bankrupt under the Acts of Congress relating to bankruptcy, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by this court that said —— be discharged from all debts and claims which are made provable by said acts against his estate, and which existed on the —— day of ——, A. D. 19—, on which day the petition for adjudication was filed —— him; excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.

Witness the Honorable —, judge of said district court, and the seal thereof this — day of —, A. D. 19—.

[Seal of the court.] ——, Clerk.

### No. 165.

## Deed from Trustee to Purchaser.

Know All Men by These Presents: That Whereas, on the —— day of —— 19—, A. B. was duly adjudged bankrupt by the District Court of the United States for the —— District of ——, and the said A. M. was duly appointed and qualified as trustee of the estate of the said A. B., in bankruptcy, and is

now acting as said trustee, and on the —— day of ——, 19—, said trustee filed a certain petition in said District Court of the United States for the —— District of ——, praying among other things, for an order of sale of certain real estate therein mentioned and hereinafter described.

And Whereas, proceedings were had on said petition in accordance with the bankruptcy laws of the United States in such case made and provided, and the petition coming on for hearing on the — day of —, 19—, of which hearing ten days' notice had been given by mail to creditors of said bankrupt, it was ordered that the said trustee be authorized to sell the portion of the bankrupt's estate specified in his petition and hereinafter described, by auction (or at private sale, or as may be), keeping an accurate account of the property sold and the price received therefor, and to whom sold, and on the same day in pursuance of said order and judgment, and order of sale of said real estate therein described, was issued out of said court under the seal thereof to said A. M., trustee of the estate of A. B., in bankruptcy, as aforesaid, directed, commanding him to execute the said order, and of the same, together with his proceedings thereon, to make due return to said court.

 highest and best bid that was offered, and being more than seventy-five percentum of the appraised value of said premises, he then and there sold the same to said G. S. for that sum.<sup>1</sup>

And Whereas, on the —— day of ——, 19—, the said court having examined the proceedings of the said sale, aforesaid, under said order of sale, and it appearing to the court that said sale was in all respects legally made, ordered that the same be approved and confirmed, and that said A. M., trustee, as aforesaid, should execute and deliver a proper deed to the purchaser, of the real estate so sold.

All of which will more fully appear by the records of said court, to which reference is here made.

Now, therefore, I, the said A. M., trustee of the estate of A. B., in bankruptcy, aforesaid, by virtue of said order of sale, sale, and confirmation, and of the statute in such cases made and provided, and of the powers vested in me and for and in consideration of the premises, and the sum of —— dollars (\$——) paid, or secured to be paid to me by said G. H., the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, and convey to the said G. H., his heirs and assigns forever, the following real estate, situated in the county of ——, in the state of ——, and in the —— and bounded and described as follows: [Here set forth the description by metes and bounds.]

To have and to hold said premises, with all the privileges and appurtenances thereto belonging, to the said G. H., his heirs and assigns forever, as fully and completely as the said A. M., as such trustee in bankruptcy, by virtue of said order of sale, sale, and confirmation, and of the statute made and provided for such cases, might or should sell and convey the same.

In witness whereof, the said A. M., as such trustee, has hereunto set his hand, this —— day of ——, A. D. 19—.

Signed and acknowledged in presence of:

R. S.

G. T. A. M.,

Trustee of the Estate of A. B., in Bankruptcy

The State of—	)
County of—	SS,

Be it remembered, that on this — day of —, 19—, before me, the subscriber, a notary public, in and for said county, personally came the above named A. M., as trustee of the estate of A. B., in bankruptcy, the grantor, in the foregoing deed, and acknowledged the signing of the same to be his voluntary act and deed as such trustee for the uses and purposes therein mentioned.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal on the day and year last aforesaid.

[Seal.]

J. R.,

Notary Public in and for the —— County of ——, State of ——.

(1) In case of a private sale omit this paragraph and state the terms and conditions of the order of sale actually complied with and proceed with the form as given.

## APPELLATE PROCEEDINGS.

### No. 166.

## Petition for Appeal in Bankruptcy (1).

The District Court of the United States for the — District of —.

In the Matter of L. W., doing business as
L. W. & Son, Bankrupt.

No. ——
In Bankruptcy.

Petition on appeal of B. Y., trustee in bankruptcy, of L. W., doing business as L. W. & Son, Bankrupt.

The above named B. Y., trustee in bankruptcy, considering himself aggrieved by the judgment made and entered on the —— day of ——, in the above entitled cause, does hereby appeal from such judgment to the United States Circuit Court of Appeals for the —— Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and he prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said

judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the —— Circuit.

Attorney for B. Y., Trustee in Bankruptcy.

The foregoing claim of appeal is allowed.

A. C., District Judge.

(1) An appeal lies from a court of bankruptcy to the Circuit Court of Appeals in three classes of cases specified in sec. 25 of the Bankruptcy Act of 1898 and in no other cases.

#### No. 167.

# Order Granting Appeal in Bankruptcy, Severing Co-defendants and Allowing Supersedeas.

The District Court of the United States for the — District of —.

A. B., et al., Petitioners vs.

C. D., et al., Respondents.

The defendant, D. G., having heretofore filed herein his petition for appeal and assignment of errors, and having given notice to E. F. and G. H., and they failing to appear, said appeal is allowed to petitioner, and said E. F. and G. H. mav be made appellees.

Said appeal is to operate as a supersedeas of the decree of ——, but not to affect the injunction granted ——, upon the execution of a bond in the penalty of \$——.

The United States Fidelity and Guaranty Company of Baltimore, Maryland, is accepted on said bond as surety, and said bond is now approved.

#### No. 168.

# Order Allowing Cross-Appeal.

[Caption in Trial Court.]

This day came the complainant herein by its counsel, and presented the petition for a cross-appeal and an assignment of errors accompanying the same, which petition upon consideration of the court is hereby allowed and the court allows a cross-appeal to the United States Court of Appeals for the —— Circuit upon the filing of a bond in the sum of five hundred dollars (\$500.00) with good and sufficient security to be approved by the court.

#### No. 169.

# Bond on Appeal in Bankruptcy (1).

Know All Men by These Presents: That we, A. B., as principal, and S. R. and L. P., as sureties, are helf and firmly bound unto C. D. in the full and just sum of —— (\$——) dollars, to be paid to the said C. D., his certain attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this —— day of —— in the year of our Lord one thousand nine hundred and ——.

Now, the condition of the above obligation is such, that if the said A. B. shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of

L. S. .

A. B. [Seal.]

G.S.

S. R. [Seal.] L. P. [Seal.]

Approved by

100

H. S.,

U. S. Circuit Judge.

(1) An appel to operate as a *supersedeas* must be filed in accordance with R. S. sec. 1007. Adams vs. Law, 16 How. 148; Kitchen vs. Randolph, 93 U. S. 86.

A trustee in bankruptcy is not required to give bond on appeal. Sec. 25c of the bankruptcy law of 1898, 30 Stat. at L. 544.

## No. 170.

# Citation on Appeal in Bankruptcy.

The United States of America, —— Judicial Circuit, ss. To The D. M. Grocery Company — Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the —— Circuit, to be holden at the city of Cincinnati, in said district, on the —— day of —— next, pursuant to a petition on appeal and assignment of error filed in the clerk's office of the District Court of the United States for the —— district of ——, —— division, in the matter of F. H., doing business as F. H. & Son, to show cause, if any there be,

may be].

why the judgment rendered in said cause reversing the finding and order of the referee in bankruptcy disallowing and expunging the claim of The D. M. Grocery Company and ordering the allowance of said claim, as proved by it, before said referee, in the sum of \$——, as in said petition of appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. A. C., Judge of said District Court, this —— day of —— in the year of our Lord ——, and of the independence of the United States of America the one hundred and ——.

A. C.,

United States District Judge.

#### No. 171.

## Assignment of Errors to an Adjudication of Bankruptcy.

District Court of the United States, District of ——.

In the Matter of A. B. and C. B.

In Bankruptcy.

No. ——.

And now on this the —— day of ——, came A. B. and C. B. by R. X., Esq. and T. B., their attorneys, and say that the judgment in said cause adjudicating them involuntary bankrupt is erroneous and against their just right, and they assign the judgment of said District Court adjudicating them bankrupts is erroneous and against their just right in that it was adjudged that [here state the ground of the objection, as, in that they were insolvent, or had given a preference, or as

Wherefore the said A. B. and C. B. pray that the said judgment may be reversed and said petition in involuntary bankruptcy against them be dismissed.

R. X.

T. B., Attorneys for A. B. and C. B.

### No. 172.

## Assignment of Errors to an Adjudication of Bankruptcy.

The District Court of the United States, for the —— District of ——.

Your petitioner assigns the following as the errors upon which he will rely:

First. The court erred in failing to hold that the petitioners had estopped themselves from prosecuting their petition herein on account of the execution by the said C. D. & Company of the alleged deed of assignment.

Second. The court erred in adjudicating the firm of C. D. & Company, bankrupt.

. Third. The court erred in adjudicating the individual members of said firm, and especially your petitioner, bankrupt.

Wherefore, your petitioner prays that the court would allow an appeal herein from the said decree of ——, and would approve a bond for the stay of all proceedings pending such appeal, and your petitioner will ever pray, etc.

> D. G. X. & X., Attorneys for D. G.

### No. 173,

# Assignment of Errors by a Trustee in Bankruptcy to the Allowance of a Claim.

The District Court of the United States, for the —— District of ——.

In the Matter of L. W., doing business as L. W. & Son, Bankrupt.

And now on the —— day of ——, comes the said B. Y., as trustee in bankruptcy of L. W., doing business as L. W. &

Son, bankrupt, by R. X., Esq., his solicitor, and says that the decree in said cause is erroneous and against the just rights of said trustee in bankruptcy for the following reasons:

First. Because the evidence shown and set out in the agreed statement of facts certified by the referee to be correct shows that said The S. D. Grocery Company, received preferences which it did not surrender or offer to surrender at the time of or before proving its claim.

Second. Because the facts as set out in the agreed statement of facts and certified by the referee to be correct shows that said claimant, The S. D. Grocery Company, within four months next preceding the date when the petition in bankruptcy was filed, had received preferences in excess of further credits afterward given in good faith by it to said bankrupt debtor without security of any kind for property which became a part of the estate of said bankrupt debtor, and remained unpaid at the time of adjudication for bankruptcy herein, in the sum of \$——.

Third. Because the evidence showed that said claimant, the S. D. Grocery Company should not be allowed to prove its claim until it had surrendered or offered to surrender the amount of the excess of preference it has received from said bankrupt within four months prior to the filing of the petition in bankruptcy, over the amount of subsequent credits extended to said bankrupt, without security of any kind, by said claimant for property which became a part of the estate of said bankrupt.

Fourth. Because the evidence showed that the finding and order of the referee in bankruptcy disallowing and expunging the claim of said The S. D. Grocery Company was correct and legal.

Fifth. Because the finding, judgment and decree of this court reversing the action of the referee in disallowing said claim for \$—— without any refunder of preferring and expunging said claim and in allowing said claim for \$—— without any refunder of preference on the part of said claimant is erroneous and illegal.

Sixth. Because the evidence showed that within four months prior to the time of the filing of the petition in bank-ruptcy claimant received, at different times, within said period, payments of money from said bankrupt in excess of subsequent sales of merchandise to said bankrupt by said claimant without security of any kind therefor.

Wherefore, the said B. Y., trustee in bankruptcy of said L. W., doing business as L. W. & Son, bankrupt, pray that said order, judgment and decree reversing the action and ruling of the referee and allowing the claim of said The S. D. Grocery Company in the sum of \$——, be reversed and that the said court may be directed to enter a decree affirming the action ruling an order of the referee.

R. X.,

Solicitor for B. Y., Trustee in Bankruptcy of L. W., doing business as L. W. & Son.

## No. 174.

# Assignment of Errors by a Creditor to Judgment Disallowing Claim.

The District Court of the United States, for the —— District of ——.

In the Matter of A. B. & Co., et al.

vs.

C. D. and Son, Defendants.

In Bankruptcy.
Assignment of
Error on Appeal.

And now, on the —— day of ——, came the said E. F. Company, a creditor of the above named defendants, C. D. and Son, by Messrs. X. & X., its solicitors, and says that the judgment and decree, in said cause are erroneous and against the just rights of said creditor of said defendants for the following reasons:

First. Because the evidence shows that the claim of said creditor of said above named defendants was a provable debt against the estate of the bankrupts.

Second. Because the evidence shows that the claim of said creditor of said above named defendants should have been allowed as a valid debt against the estate of the bankrupts.

Third. Because the evidence shows that the judgment and decree should have been in favor of this creditor of the said above named defendants and against the trustee of the above named defendant.

Wherefore, the said creditor of the above named defendant prays that said judgment and decree be reversed, and that the said court may be directed to enter a decree and judgment allowing said claim of said creditor as a provable debt against the estate of the bankrupts, in accordance with the prayer of the bill.

X. & X., Solicitors for said Creditor, The E. F. Company.

#### No. 175.

# Assignment of Errors to an Order Disallowing Claims in Bankruptcy.

The District Court of the United States for the —— Disvision of the —— District of ——.

In re A. B. Hardware Company, Bankrupt.

In the matter of the petition of M. R., G. R., and W. R., partners as R. & R., for allowance of their claim for fees and payment of the same, as expenses, or as preferred, out of the assets of the bankrupt.

Assignment of errors by R. & R. in the above matter made a part of their petition for appeal. The said appellants come, and for error in the order and judgment of the court herein, assign as follows:

First. The court erred in holding and adjudging that the general assignment of the A. B. Hardware Company was a fraud upon the Bankrupt Act.

Second. The court erred in holding and adjudging that the services charged for by petitioners, rendered in preparing the said assignment, and in effort to uphold and execute the same, can not and should not be paid out of the assets belonging to the estate of the bankrupt.

Third. The court erred in holding and adjudging that there was no lien under the statutes and laws of the state of —, on assets of the bankrupt, in favor of the said R. & R., for the payment of their fees for the services set out in their petition, at the time of the filing of the petition herein for adjudication in involuntary bankruptcy, and at the time such adjudication was made.

Fourth. The court erred in holding and adjudging that the assets of the bankrupt came to the hands of the trustee upon the adjudication of bankruptev, and his appointment as such, free and discharged of any lien in favor of petitioners for compensation for their said services, and in not holding that such assets were legally and equitably charged, with a lien for and the payment of the compensation due therefor, upon their receipt by the said trustee.

Fifth. The court erred in holding and adjudging that the referee in bankruptcy was in error in ruling that the fee of petitioners for preparing the general assignment was a provable debt against the estate of the bankrupt, and payable out of such estate, and in-reversing the judgment of the referee as to the said matter.

Sixth. The court erred in dismissing the petition of petitioners, and in not granting them the relief they therein prayed for.

Wherefore, the said R. & R. pray that the judgment of said District Court be reversed with directions to said court to allow their claim.

R. & R.

# PETITIONS TO REVIEW ORDERS IN BANKRUPTCY IN A CIRCUIT COURT OF APPEALS.

No. 176.

# Notice of Filing Petition for Review (1).

United States Circuit Cour For the —— Circuit.	t of Appeals
In re Petition of A. B., For Review.	In Bankruptcy.
in bankruptcy for G. H.:	the C. D. Trust Company, trustee
12 o'clock m., I will file	that on the —— day of ——, at in the clerk's office of the United
city of —, a petition for	ppeals for the —— Circuit, in the review in the above entitled cause.
notice, and I will then ask	s hereto attached as a part of this to have the case docketed and the
_	ein to have such case set down for
hearing.	R. X., Attorney for Petitioner.
~	of the above notice this —— day
of ——. of ——.	В. Ү
Attorney for C. D	D. Trust Co., Trustee in Bankruptcy said Bankrupt's Estate.

(1) Some notice should be given the parties in the bankruptcy court who are interested in the appeal either by form of citation or notice. The petition is sometimes filed in the Court of Appeals and when docketed and printed, a copy of the printed petition and exhibits are served upon opposing counsel. The better practice, however, is to give notice in substantially the form above given.

### No. 178.

# Petition to a Circuit Court of Appeals to Review an Order in Bankruptcy (1).

The United States Circuit Court of Appeals
For the —— Circuit.

In the Matter of A. B. and C. B.,
Petition for Review.

To the Honorable Judges of the United States Circuit Court of Appeals for the —— Circuit.

The petition of A. B. and C. B. respectfully shows unto the court:

First. That on the —— day of ——, A. D. ——, they presented the petition unto the Honorable G. S., judge of the District Court of the United States for the —— District of ——, a true copy of which petition is hereto attached and marked "Exhibit A."

Second. On the —— day of ——, A. D. ——, the said A. H., trustee in bankruptcy, and G. F., administrator of the estate of E. F., deceased, by their counsel, filed a plea and demurrer to said petition, a true copy of each of which is hereto attached and marked "Exhibits B. and C." No other persons appeared in opposition thereto.

Third. On the —— day of ——, A. D. ——, the Honorable G. S. entered an order duly dismissing said petition with costs and sustaining said demurrer; said matter having been fully argued before said court.

Fourth. Your petitioners charge the fact to be that the said District Court erred in dismissing said petition and in sustaining said demurrer; and your petitioners are aggrieved thereby and therefore pray this honorable court to review and revise the decision of said court below.

Fifth. No proof was taken in connection with the determination by the Honorable G. S. and the entire proceedings

upon which said dismissal was grounded appear in the exhibits hereto attached.

Sixth. Your petitioners further show that no opinion was filed by said court in the matter.

Seventh. Your petitioners therefore pray that such order of the District Court be set aside and held for naught and that by the order of this court it be decreed that your petitioners have a right to have an issue framed and the truth of the averments contained in their said petition determined according to the rules and procedure applicable in such cases, and that your petitioners be given such other relief as shall be proper.

That an order be entered directing the manner and time of service of this petition.

A. B.,

C. B.,

R. X., Attorney for Petitioners.

A. B., one of the petitioners mentioned and described in the foregoing petition, does hereby make solemn oath that the statements contained therein are true according to the best of his knowledge, information and belief.

A. B.

Sworn and subscribed to before me this —— day of ——, A. D. ——. J. N.,

Notary Public, --- County, ----.

(1) Congress has provided two means of review by a Circuit Court of Appeals of orders and judgments of a court of bankruptcy. Sec. 25 of the Bankruptcy Act of 1898 provides for appeals in three classes of cases. Par. 24b of the same act provides for superintending and revising in matters of law only. An appeal is taken in the usual form, and the Court of Appeals may review both matters of fact and law on such proceedings. But on a petition to review an order of a court of bankruptcy the Circuit Courts of Appeals are confined to questions of law.

### No. 179.

# Petition in Circuit Court of Appeals to Review an Order in Bankruptcy Disallowing Labor Claims.

The United States Circuit Court of Appeals For the —— Circuit.

In re A. B. & Company, et al., Petitioners.

And now comes E. F., for himself and eighty-eight other labor claimants, whose names, as well as the amounts due them, respectively, for labor performed by them for said A. B. & Company within three months next before the appointment of the receiver, August 27th, 1898, appear in the agreed statement of facts attached to this petition and marked "Exhibit A," and, complaining of the orders and judgment heretofore rendered against these complainants by the Hon. A. I., judge of the District Court of the United States for the —— District of ——, says:

On the 22nd day of October, A. D. 1900, this cause came on to be heard before said judge, to review the proceedings and final order of A. M., Esq., one of the referees in bankruptcy within and for said district, which said proceedings and final order was based upon said agreed statement of facts.

All creditors and all persons in interest having consented to said agreement, and to this proceeding, and having so consented after the expiration of the time limited for other persons to come into the case, it is conceded that all are bound by the order of this court under the provisions of said stipulation.

Your petitioners contended in the court below, as they now contend in this court:

First. That upon the facts set forth in said agreed statement of facts which is attached hereto, marked "Exhibit A," and made a part of this petition, said funds passed into the hands of the said trustee charged by force of the laws of —— with an equitable lien in favor of said claimants, and each of them

as set forth in schedule B, attached to said statement of facts, and that said claimants were and are entitled to be first paid from said funds after the payment of taxes and costs of administration.

Second. That in said proceedings of the Common Pleas Court, that court acquired full and complete jurisdiction for the purpose of determining the respective rights of the parties to that suit. That the parties and subject-matter were all before that court, and that no other court had jurisdiction, nor could they acquire jurisdiction to adjudicate and determine the issues there involved.

That no proceedings were ever instituted in the court of bankruptcy to stay that proceeding, and that that court had, therefore, complete jurisdiction to proceed as it did proceed to final decree, and that before the adjudication in bankruptcy.

The petitioners, therefore, contended, as they now contend, that that fund was in the custody of that court, which was proceeding to administer upon it, and that by reason of the ruling and judgment herein complained of, they have been aggrieved and damaged to the full extent of the several amounts due them as aforesaid.

This cause thus being submitted to the court on questions of law arising upon the facts so as aforesaid agreed upon by all the parties having an interest in the estate of said bankrupt, or either of them, the court decided and held, as matter of law:

First. That section 3206a of the Revised Statutes of ——created no lien in favor of said labor claimants upon the funds in the hands of the receiver in the state courts, or in the hands of the trustee in bankruptcy for distribution.

Second. That section 64b of the Bankrupt Act does not fix or prescribe any lien in favor of the wages due these claimants.

Third. That under the facts set forth under the agreed statement of facts, said labor claimants have no interest in said funds other than as common creditors,

The court declined to pass upon and construe the effect and validity of the decree of the Court of Common Pleas of ——county, ——, in favor of said labor claimants January 13th, 1899.

The court thereupon ordered, adjudged and decreed that the orders of said referee heretofore made in this case upon the same issues, and based upon the same facts in respect to these labor claims, be affirmed, and that the petition of these claimants on their behalf be, and the same was dismissed. A copy of said order, marked "B," is attached hereto.

To all of which ruling of law and judgment of the court these labor claimants at the time excepted and still do except, and they now pray this honorable court to review said rulings, orders and judgments of the honorable District Court herein complained of, order the payment of said labor claims as set forth in said schedule "A," attached to said agreed statement of facts from the funds now in the hands of the trustee, H. S., and for such other relief as they may be found entitled to.

Y. & Y.

Attorneys for all the within named labor claimants and Petitioner, E. F.

United States of America, State of ——, County of ——, ss. District aforesaid.

E. F., being the petitioner above named, for himself and others, does hereby make solemn oath that the statements contained in the foregoing petition subscribed by him are true.

E. F.

Sworn to and subscribed by E. F., before me, this —— day of ——, A. D. ——.

W. E.,
Notary Public,
—— County.

(1) Taken from the record in re Laird, 109 Fed. Rep. 550, 48 C. C. A. 538.

#### No. 177.

Petition to a Circuit Court of Appeals to Review an Order in Bankruptcy to Compel Assignee to Pay over Moneys to Trustee.

United States Circuit Court of Appeals, Sixth Circuit.

Leonard Comingor, Petitioner. In Bankruptcy.

The petitioner, Leonard Comingor, respectfully represents that on the 14th day of February, 1899, Sinsheimer, and others, creditors of Simonson, Whiteson and Company, filed their petition in bankruptcy in the District Court of the United States for the district of Kentucky, showing that said debtors made an assignment to this petitioner December 5th, 1898, for the benefit of creditors, asking an adjudication in bankruptcy and praying a subpœna against the alleged bankrupts' and this petitioner, to which said alleged bankrupts tendered answer and plea and this petitioner did, March 21st, 1899, move the court to dismiss as to him and without waiving the same, tender an answer, although nothing was alleged against him save that he was assignee for creditors. Petitioner says that no further notice was taken of him in this proceeding and no action taken on his motion to dismiss or offer to He says that in both subsequent appeals and in all proceedings subsequent to said motion to dismiss, he was simply dropped out of the case by common consent. He says he was never treated or considered as a party to this bankruptcy proceeding by the court or the parties, since March, 1899, either in the District Court or either of the appeals to this court, as the orders, pleadings and records will show. (See record in this court No. 716, page 20, paragraph 3, which record is hereinafter referred to as part hereof.)

This petitioner says further that on March 28th, 1899, said Simonson, Whiteson and Company were adjudged bankrupts and an appeal was taken to this honorable court, resulting in a reversal, with directions to the District Court to allow the

tendered answer of Simonson, Whiteson & Company to be filed and directing a trial on issue made. In accordance there-to said District Court did on August 12th, 1899, set aside and annul said adjudication, file said answer, and on the 20th day of September, 1899, again adjudge said Simonson, Whiteson and Company bankrupts, who again appealed, September 22nd, 1899. All of the matters herein so far referred to appear in Records, Nos. 716 and 777, in this court, and are referred to as parts hereof.

Petitioner says that on said last appeal the adjudication of the said District Court, made the 20th day of September, 1899, was affirmed and the mandate of this court was filed below on the 17th day of May, 1900, and the case referred to Baskin, referee in bankruptcy, who did on the 28th day of May, 1900, enter an order without notice and no appearance of any one, directing this petitioner to file with him an itemized statement of receipts and disbursements as assignee under the deed of assignment of the bankrupts and to appear before him in person to settle his accounts as said assignee. A certified copy of said order was served on this petitioner and is filed herewith as part hereof, marked Exhibit No. 1.

Petitioner says that he was thus required to give and did give to said referee said itemized account, from which it appeared that before any proceedings in bankruptcy he had realized on all the assets of the bankrupts, under direction and order of the state court, where a suit was pending long before any petition in bankruptcy, in which he was settling his accounts; that he realized from said assets the sum of \$92,865.77, being over 22 per cent. more than the appraised value as made under oath by the appraisers appointed by the state court; that he had disbursed for expenses in carrying on the business and converting assets into cash the sum of \$19,876.73; that he drew as his commissions \$3,398.90, and paid his counsel for necessary services \$3,200.00, all before any proceedings in bankruptcy. A copy of said statement is filed as part hereof. marked Exhibit No. 2.

Whereupon, on the 20th of June, 1900, the referee entered an order appointing the Louisville Trust Company receiver herein and directing the said receiver to apply to the Jefferson Circuit Court! Common Pleas Division, for an order directing the state court receiver to pay over to the receiver herein the entire fund in said state court in the action of L. Comingor, assignee, etc., vs. Simonson, Whiteson and Co., at the same time directing that the receiver shall not appear in said action and shall not receive less than the whole sum in said court. Said referee's order further required petitioner herein and his counsel in said state court proceedings to appear three days thereafter and show cause why they should not pay over to the receiver the sums held by them as commissions and fees and the balance of \$6,766.53, not then paid into the state court by Comingor, assignee, for creditors and still in his hands. copy of said order is filed as part hereof, marked Exhibit No. 3. On the next day, June 21st, 1900, said Trust Company, receiver herein, appeared before said state Circuit Court and asked leave to withdraw the entire fund in court, \$46,305.03, all of which was submitted to said Circuit Court. A copy of said motion is filed as part hereof, marked Exhibit No. 4. Accompanying said motion was a notice served on petitioner by the receiver in bankruptcy that the motion would be made before the state court June 21st, 1900, and a copy of an injunction of the District Court in this matter enjoining and restraining this petitioner from making any opposition to said motion, said injunction expressly prohibiting this petitioner by name "from taking any steps, instituting or having any proceedings affecting the estate and assets of Simonson, Whiteson and Co., in any state court and especially in action No. 19,944 entitled L. Comingor, etc., vs. Simonson, Whiteson, etc., pending in the Jefferson Circuit Court." A certified copy of said injunction and said notice are hereby filed herewith as part hereof marked Exhibits Nos. 5 and 6, respectively. All of which the state court took under advisement.

At the same time that the receiver in bankruptcy was applying to the state court as shown, and your petitioner was restrained from opposing or appearing in response to said notice, the referee in bankruptcy, sua sponte, ruled the petitioner herein to pay to said receiver the money retained by him as commissions as appears in said Exhibit No. 3. Petitioner responded June 23rd, 1900, to this rule, that he retained the money as his commissions as assignee under the deed before any proceedings in bankruptcy, and that he had used them and was unable to pay it to the receiver. A copy is herewith filed as part hereof, marked Exhibit No. 7. Immediately on filing said response, said referee adjudged the same insufficient, made the rule absolute, and ordered the petitioner to pay said sum to the receiver before June 30th, 1900. A copy of said order is filed herewith as part hereof marked Exhibit No. 8. Before said date, however, viz., June 28th, 1900, said referee, without notice or appearance of any one and sun sponte entered another show cause order and had the same served on petitioner, ruling him to pay by June 30th, 1900, to the receiver in bankruptcy the further sum of \$3,000.00, "recited in his report," as having been paid to his counsel and the further sum of \$200.00, as shown in said report to have been paid to others' counsel. A copy of which order is filed as part hereof, marked Exhibit No. 9. To which this petitioner responded June 30th, 1900, that these payments were made before any bankruptcy proceedings, that he has no means to pay said sums to the receiver, that before the petition in bankruptcy was filed and before he had any knowledge, information or intimation that it would be filed, relying upon it that he would wind up his trust under the assignment, he filed his petition in the said court and his action is there pending and he is still subject to that jurisdiction and required to settle in the state court. A copy of this response is filed as part hereof marked Exhibit No. 10. On the same day that said response was filed, June 30th, 1900, the Jefferson Circuit

Court declined to entertain said bankruptcy receiver's motion hereinabove shown to withdraw funds from the court, because said receiver was not a party to the action, and said court suggested that the motion would be entertained when said receiver filed his petition asserting claim to the fund as provided in section 29, Kentucky Code of Practice. Said ruling of the court is in writing and a copy thereof is filed as part hereof, marked Exhibit No. 11.

In accordance with the suggestion of the state Circuit Court the receiver (who had in the meantime been chosen trustee in bankruptcy), did on the 3rd day of July, 1900, file a claimant's petition under said Kentucky Code provision, in the state Circuit Court, making himself a party to said action, having been directed so to do by the order of the referee in bankruptcy. A copy of said petition and exhibits attached thereto, including the said referee's order are filed as parts hereof, marked Exhibit No. 12. Thereafter, on July 5th, 1900, said trustee in bankruptcy tendered his proposed order for withdrawal of said fund accompanying the same with notice to petitioner's counsel and their response whereupon the court made him a party and entered the motion for leave to withdraw the funds then in said court, and sustained his motion and gave said trustee leave to withdraw, which was done. A copy of said motions or order and the notice to petitioner's counsel and their reply is filed as part hereof, marked Exhibit No. 13.

From all of which it appears that the trustee in bankruptcy became a party to the petitioner's suit for settlement in the state court, made it appear to said court that all its officers, including petitioner and his counsel, were paid and the fund remaining in said court would be distributed among the creditor beneficiaries of said deed of assignment and thus obtained the said fund for distribution in bankruptcy herein. At the same time, whilst this was being done, the petitioner was under injunction from the District Court herein as already shown,

preventing any action on his part in said state court, and at the same time was being pressed by said show cause rules of the referee in bankruptcy to surrender his commission and pay back the money expended by him in paying counsel before any bankruptcy proceedings, his response to said rules, among other things, showing that the state court suit was pending and he was within that jurisdiction making his settlement. therefore, filed his petition for review by the District Court, a copy of which is filed as part hereof, marked Exhibit No. 14. Upon which the referee filed his report in said District Court, of which a copy is filed as part hereof, marked Exhibit No. 15. On the 7th day of July, 1900, said petition for review came on for hearing before the District Court, was heard, and the District Court took time to consider; then, on the 16th day of July, 1900, the court entered an order referring the matter back to the referee with directions to take testimony concerning the character of the services of the petitioner and his counsel under the deed of assignment, and their value to the bankrupt estate, and directing the referee to report findings of fact and any modification he might choose to make of his former report and recommendation, a copy of which is filed as part hereof, marked Exhibit No. 16. Whereupon, the referee immediately commenced taking evidence and continued to take from time to time, during which, viz., on the 10th day of November, 1900, this petitioner filed an additional response before the referee, showing in substance that as appears in these proceedings, neither the referee nor the District Court has any jurisdiction of the petitioner or of the subject-matter in controversy, and this whole proceeding is illegal and in conflict with the provisions of the bankruptcy law. A copy of said response is filed as part hereof, marked Exhibit No. 17. Thereafter the referee reported to the District Court on December 11, 1900, in which report he declines to modify his former rulings and report, and recommends the dismissal of petitioner's appeal to the District Court for review. A copy of said report is filed herewith as part hereof, marked Exhibit No. 18. Thereafter, on December 22nd, 1900, and whilst this matter was pending before the District Court, the said amended or additional response (Exhibit No. 17) was also filed in said court.

Thereafter, on the 19th day of January, 1901, the District Court filed an opinion, of which a copy is filed as part hereof, marked Exhibit No. 20, sustaining the referee and dismissing the petition for review and directing proper orders to be entered to that end, which orders were entered on the 26th day of January, 1901; and a copy of the same is filed as part hereof, marked Exhibit No. 21, and which is in words and figures as follows:

In the District Court of the United States, Saturday, January 26th, 1901.

In the Matter of
Sinsheimer, Levinson & Co., etc.,

vs.

Simon, Whiteson & Co., D. G. Simonson, I. Whiteson & Leo Stern.

This cause coming on to be heard on the petition of Leonard Comingor, for review of the order of court entered herein by John B. Baskin, one of the referees of this court, requiring Leonard Comingor to pay over to the Louisville Trust Company, trustee in bankruptcy herein, the sums of \$3,398.90 and \$3,000.00, and the court being fully advised, delivered a written opinion which was filed herein, and on Jan. 19, 1901, and in pursuance of said written opinion, it is considered ordered and decreed by the court that said petition for review filed by said Comingor, June, 1900, is refused and dismissed, to which said Comingor excepts and it is adjudged and or-

dered by the court that said Comingor pay to said Louisville Trust Company, trustee, the said sums of \$3,398.90 and \$3,000.00, on or before February 16th, 1901, to all of which said Comingor excepts.

Your petitioner further shows that he is aggrieved by the orders of said District Court and injured thereby and that the errors complained of consist:

First. In said court holding that the referee and said court had jurisdiction and power to proceed against petitioner, Leonard Comingor, in the summary way had, he being a third party, and not one of the bankrupts, in said court refusing and dismissing said petition for review and in not sustaining same.

Second. In said court holding that it had jurisdiction and power upon the proceedings, orders and recommendations of the referee had to adjudge said Leonard Comingor in contempt, and to punish him for contempt, or to order him to pay said money.

Third. In said court holding that the referee had jurisdiction and power to proceed against said Leonard Comingor, in said summary manner had.

Fourth. In said court holding that said Leonard Comingor, held said money for the bankrupts and could be proceeded against in said summary manner had.

Fifth. In said court holding that it had the power and jurisdiction herein to grant or issue the injunction against Leonard Comingor.

Sixth. In said court holding that said referee had the power or jurisdiction to issue said show cause orders or rules thereon or to proceed against said Leonard Comingor in the manner had upon said orders issued.

Seventh. In said court holding that the filing of said responses of Leonard Comingor gave said referee or court juris-

diction or power to proceed thereon in any manner in said matter, or in the manner had.

Eighth. In said referee and said court adjudging said responses and each of them insufficient.

Ninth. In said court finding the facts to be and adjudging that said sums of money were the property of the bankrupts' estate and that said Leonard Comingor never claimed title to any of it nor made any claim of right to it, or ownership thereof at any time, and that he had never claimed to have converted it to his own use, or to have claimed it adversely to the bankrupts or the trustee or the receiver in bankruptcy.

Tenth. In the court's adjudging that said money was not converted by Leonard Comingor to his own use, but held for the benefit of the trustee.

Thirteenth. In the court's finding as a fact and adjudging mingor, was properly before the court in said proceedings.

Twelfth. In the court's failing to dismiss said contempt proceedings against Leonard Comingor and discharging him.

Thirteenth. In the court's finding as a fact and adjudging that said Leonard Comingor was a party to this proceeding in bankruptcy.

Fourteenth. In the court adjudging and ordering said Leonard Comingor to pay said sums of money to the receiver (who afterwards became the trustee in bankruptcy) in the summary manner had, after ordering said receiver and trustee to make itself a party to the state court proceeding which was done, and the receiver and trustee became a party to said suit in the state court and withdrew all the money paid into the state court by said Leonard Comingor.

' Fifteenth. In the court holding that the proceedings herein against petitioner, Comingor, are equivalent to a plenary proceeding against him.

Sixteenth. In the court holding that the acts and proceedings herein by or on behalf of the petitioner, Comingor, amount

to or are equivalent to or constitute a consent to the jurisdiction of the referee in bankruptcy or the District Court herein, in these proceedings against petitioner.

Wherefore your petitioner prays that the orders, judgments and decrees of the District Court be reviewed and revised in the matters of law and that it be adjudged that said District Court was without jurisdiction, and if that can not be done, then adjudge that the summary proceedings herein were illegal and void or if that can not be done then adjudge that his responses were sufficient in law and he be discharged. He prays for an order of this honorable court directing the Districh Court to suspend the execution of its judgment of January 26th, 1901, and all further proceedings against your petitioner in this matter until the further order of this court, and he prays for all other necessary and proper relief herein.

R. X.,

Attorney for Petitioner.

State of Kentucky, County of Jefferson, ss.

Petitioner, L. Comingor, on oath states that the statements of the foregoing petition are true as he believes.

Leonard Comingor.

Subscribed and sworn to before me by L. Comingor, this 28th day of January, 1901. My commission expires January 6, 1904. D. A. Sachs,

Notary Public in and for Jefferson County, Kentucky.

<sup>(1)</sup> Taken from the record in Louisville Trust Co. vs. Comingor, 184 U. S. 18.

#### No. 180.

# Petition to a Circuit Court of Appeals to Review an Order in Bankruptcy Marshaling Liens.

United States Circuit Court of Appeals
For the —— Circuit.

In the matter of E. F., S. H., & J. K., vs.

The A. B. Company, Bankrupt.

Petition of First National Bank of - for Review.

The petition of the First National Bank of ——, a creditor of the A. B. Company, bankrupt herein, respectfully shows to this court that on the 3rd day of April, 1899, a creditor's petition was filed against the said A. B. Company, which is a corporation, in the District Court of the United States for the district of ——, and that on the 21st day of April, 1899, the said A. B. Company was duly adjudged a bankrupt, and that on said 21st day of April the District Court of —— referred said estate to A. M., referee for said court, and that one of the purposes of said reference was for said referee to receive claim against said bankrupt's estate, allow or disallow same, and to pass upon secured and preferred claims.

Your petitioner shows that on the 7th day of June, 1899, it filed its duly verified proof of claim with said referee, setting up a claim against said bankrupt's estate for seventeen hundred (\$1,700.00) dollars, said claim consisting of a note for a like amount, signed by said bankrupt and A. B., and also claiming and asserting a lien upon certain property of said bankrupt under and by virtue of a mortgage executed by said bankrupt to said A. B., J. F. and N. G., mortgagees, to secure them or any of them from loss by reason of their being liable as sureties for debts of said bankrupt or becoming liable therefor within a period of four years thereafter. The property conveyed by said mortgage is as follows:

Lying and being in —— county, of ——, and more particularly described as follows, to wit:

[Here describe the property mortgaged.]

Said mortgage was dated April 15th, 1892, was duly acknowledged and recorded October 12th, 1892, and the limit of indemnity afforded the mortgagees thereby was twenty-five thousand (\$25,000.00) dollars. A copy of said mortgage was filed with said proof of claim, and a copy thereof is filed herewith as a part hereof marked "Exhibit A."

Your petitioner further shows that its said debt was originally created April 10th, 1895, within the four years' limit set out in said mortgage, and it claimed and now claims to be substituted and subrogated to the rights of said mortgages, A. B., under said mortgage and that its said debt was protected thereby and entitled to share in the indemnity thereof. Your petitioner also showed and shows that its said debt was originally for the sum of three thousand (\$3,000) dollars, and had been reduced from time to time by partial payments thereon down to seventeen hundred (\$1,700) dollars, and that this sum was due and unpaid, and is now due and unpaid, and the lien had not and has not been waived, released nor in any wise relinquished.

Your petitioner further shows that on the 18th day of November, 1899, said referee passed upon its said claim, and allowed it only as a general or unsecured claim against said bankrupt's estate, and refused to allow the same as secured or entitled to any lien under said mortgage dated April 15th, 1892, or the rights of the said mortgagee, A. B., therein. A copy of the order of said referee upon the claim is filed herewith as a part hereof, marked "Exhibit B."

Your petitioner shows that thereafter on the 24th day of November, 1899, it filed its petition for review with said referee, setting out the error complained of, and that the referee forthwith certify to the judge of the District Court the question presented, a summary of the evidence relative thereto and the finding and order of the referee thereon. Whereupon, said

referee certified to said judge the question presented, a summary of the evidence relating thereto, the finding and the order thereon. A copy of said order of the referee is filed herewith as a part hereof marked "Exhibit C."

Your petitioner further shows that thereafter, on the 1st day of December, 1899, the judge of the said District Cours in reviewing the findings and orders of the referee on said questions, held that said debt was only a common or unsecured claim against said bankrupt's estate and not protected nor secured by the mortgage of April 15th, 1892, but said District Court allowed as a prior and secured claim a debt of twenty-five thousand (\$25,000) dollars due to the Third National Bank by said bankrupt, giving to said bank the entire indemnity afforded by said mortgage of April 15th, 1892, and adjudging to said bank a lien for the entire sum of twenty-five thousand (\$25,000) dollars. A copy of the order of the said District Judge is filed herewith as a part hereof marked "Exhibit D."

Your petitioner further shows that the question of law decided by the District Court was, that under the provisions and construction of the mortgage of April 15th, 1892, your petitioner was not entitled to any share or *pro rata* in the indemnity of said mortgage, or to be substituted to the rights of the mortgagee, A. B., thereunder, but that the Third National Bank was entitled to and should receive all of said indemnity, and be adjudged a lien for the entire sum of twenty-five thousand (\$25,000) dollars.

Your petitioner further shows that at the time the District Court made the order complained of herein there was only twenty-two thousand (\$22,000) dollars of indebtedness of said bankrupt due said Third National Bank which was in existence at the execution of the mortgage, or was created within four years thereafter, and that the balance of said twenty-five thousand (\$25,000) dollars, to wit, three thousand (\$3,000) dollars, was not created until more than four years

after the execution of said mortgage, and said three thousand (\$3,000) dollars was not and is not secured thereunder.

Your petitioner further shows that it is aggrieved by the orders of the said District Court, and injured thereby, and that the error complained of consists:

First. That said District Court did not allow and refused to adjudge your petitioner a lien for its said debt upon the property of said bankrupt's estate under and by virtue of the provisions of the mortgage of April 15th, 1892, and the rights of mortgagee, A. B., thereunder, upon the property of the bankrupt described therein, and refused to subrogate your petitioner to said mortgagee's rights.

Second. That said District Court did not allow, and refused to adjudge your petitioner its pro rata share upon its said debt of the indemnity afforded the mortgagees in the mortgage of April 15th, 1892.

Third. That said District Court allowed and adjudged to the Third National Bank the full amount of indemnity afforded the mortgagees in the mortgage of April 15th, 1892, to secure a debt of twenty-five thousand (\$25,000) dollars, when your petitioner shows that three thousand (\$3,000) dollars thereof was not and is not secured by said mortgage.

Fourth. That said District Court adjudged that the entire security of said mortgage redounded to the benefit of said Third National Bank, when the debt of said bank is not specifically provided for therein, nor does said mortgage show said bank is entitled to any priority or security superior to your petitioner.

A Your petitioner shows that under the provisions of the mortgage of April 15th, 1892, and under the rules of equity and the law of substitution and subrogation, and under section 64, b. 5, chapter 7, of the Bankruptcy Act of 1898, your petitioner is entitled to all the rights of said mortgagee, A. B., to the extent of its said debt, and that thereunder your petitioner has a lien upon the property in said mortgage described to secure its said debt, inferior only to that of the S. Trust Company, trustee, and Mrs. Anna Mueller, and of equal dignity to the lien of the Third National Bank, and that it was the duty of the District Court to so hold.

Your petitioner asks for an early hearing of this matter, and that the same may be presented upon the petition and exhibits filed herewith, or if your honors so direct, upon the original pleadings, proofs, evidence and proceedings now on file in the office of the clerk of the United States District Court, where said proceedings were had.

Wherefore, your petitioner prays that the order of the said District Court may be reviewed and revised in matters of law so as to adjudge your petitioner a lien for its said debt under the mortgage of April 15th, 1892, and the rights of mortgagee, A. B., thereunder for its costs herein, and all proper and equitable relief.

R. X.,

[Verification.]

Attorney for Petitioner.

Taken from the record in Courier-Journal Job Printing Co. vs. Schaeffer-Meyer Brewing Co., 101 Fed. Rep. 699, 41 C. C. A. 614.

#### No. 181.

## Petition to a Circuit Court of Appeals to Review an Order in Bankruptcy under sec. 67f.

The United States Circuit Court of Appeals

For the —— Circuit.

In the Matter of A. B., Bankruptcy. Bankruptcy.

Your petitioner, T. A., comes and shows to the Honorable Court, that on September 10, 1900, A. B. was adjudged a bankrupt in the District Court of the United States for the —— Division of the —— District of ——, and that on the 22nd day of the same month your petitioner was duly appointed trustee of the estate of said bankrupt, and having qualified

as such, has since been, and is now, in the discharge of the duties of said trust.

At the time of filing his petition in bankruptcy, the said A. B. was the owner of a stock of merchandise in —— county, -, which he had acquired about two months previous, and which constituted all his available assets. In October, 1893. C. Bros. obtained judgment against him in the Supreme Court at —, for \$— and cost of suit. An alias execution was issued on this judgment by the clerk of the Supreme Court on September 6, 1900, tested the first day of the preceding term, to wit, the second Monday in September, 1899, which came to the hands of the sheriff of --- county, ---, the next day, and was by him, on September 8, 1900, levied on said stock of merchandise. This with the levy of another execution, precipitated the bankruptcy of A. B., who filed his petition the same day, but a few hours later. He was insolvent when the levy was made, and had been more than four months prior thereto.

Under the orders of the bankrupt court said stock of goods was turned over to petitioner as trustee, who converted the same into cash. The proceeds were enough to pay said judgment and cost, but insufficient to pay all the creditors of said bankrupt.

The said judgment creditors asserted a prior claim to the proceeds of said stock of goods, claiming a lien thereon by virtue of the levy of said execution as of the date of the teste of the execution, which your petitioner denied, insisting the levy and whatever lien the creditors obtained by said levy, was avoided by the subsequent bankrupt proceedings had within four months next after the levy. The referee refused to allow the judgment creditors priority, sustaining the contention of the trustee, but his action was overruled by said district judge, who sustained the contention of the said judgment creditors, and ordered the payment of their judgment, interest and cost in full.

Your petitioner excepted to the said action and judgment of said district judge, and the said creditors and petitioner filed in said court a condensed and agreed statements of facts and the record in the cause, and a duly certified copy of the same is filed herewith as Exhibit No. 1, with the prayer that it be made part of this petition.

Your petitioner shows that the levy and lien created by the levy of said execution, was avoided by the subsequent bankruptcy proceedings, under section 67f of the B. A. of 1898, making null and void all levies, judgments, attachments or other liens, obtained against an insolvent person at any time within four months prior to filing a petition in bankruptcy, and the said trustee is aggrieved by the action and judgment of said district judge in refusing to avoid the levy of said execution and discharge the lien created thereby, thus defeating the lawful application of the section referred to, and preventing a ratable distribution of the estate of said bankrupt amongst all his creditors.

The trustee therefore prays that he be allowed to file this, his petition for a review of the action of said district judge, and that said judgment be reviewed, revised and reversed, and that petitioner be allowed and directed to make a ratable distribution of the estate of said bankrupt amongst all his creditors, and he will ever so pray.

T. A., Trustee.

R. Y., Attorney.

State of ——, County of ——, ss.

Personally appeared before me, the undersigned authority, T. A., and makes oath in due form of law, that he is the trustee in the foregoing matter, and is familiar with all the facts set out in the foregoing petition, and that the same are true to the best of his knowledge and belief.

T. A.

Sworn to and subscribed before me, this —— day of ——. [Seal.] J. N., Notary Public in and for ——,

Notary Public in and for ——, County ——.

(1) Taken from the record In re Darwin, Petitioner, 117 Fed. Rep. 407.

# MISCELLANEOUS ENTRIES, ORDERS, ETC.

No. 182.

# Stipulation Reducing Record.

The District Court of the United States, for the

—— District of ——.

A. B., Plaintiff, vs.

C. D., Defendant.

In the above-entitled case, it is hereby stipulated by the solicitors for the parties thereto that if an appeal be taken, the clerk, in making a transcript of the record may omit therefrom the following papers and records, to wit [here set forth the papers and records by name which are to be omitted], and that an order may be entered if the same to the court shall seem proper, in accordance with this stipulation.

Dated ——. [To be signed by all the solicitors.]

#### No. 183.

# Praecipe Designating Parts of Record to be Included in Transcript of Appeal or Writ of Error (1).

The District Court of the United States For the —— District of ——.

A. B.,

vs.

C. D.

To the Clerk:

You are requested to take a transcript of record to be filed in the United States Circuit Court of Appeals for the —— Circuit, pursuant to an appeal [or writ of error] allowed in the above-entitled cause and to include in such transcript of record the following and no other papers or exhibits, to wit:

[Here specify by name each paper desired to be included in the transcript.]

Respectfully,

X. & X..

## Attorneys for Appellant [or Plaintiff in Error.]

(1) The certificate of the clerk should show that the transcript of record was made in accordance with præcipe of the party removing the case, designating the papers to be included. See Meyer vs. Mansur & Tebbetts Imp. Co., 85 Fed. Rep. 874, 29 C. C. A. 465; Nashua & Lowell Corp. vs. Boston & Lowell Corp., 61 Fed. Rep. 237 (244), 9 C. C. A. 468; Cunningham vs. German Ins. Bank, 103 Fed. Rep. 932; R. R. Co. vs. Schutte, 100 U. S. 644; West vs. East Coast Cedar Co., 113 Fed. Rep. 737.

It is proper, but not necessary, for counsel to submit pracipe to adverse counsel before the transcript is made. In case the clerk is requested by one party to include a paper in the transcript and is requested by the other party to leave out the same paper, he may apply to the judge for instruction. Hoe vs. Kahler, 27 Fed. Rep. 145.

The clerk should not transmit original papers except for the purpose of inspection. Smith vs. Craig, 100 U. S. 226.

### No. 184.

# Praecipe for Transcript in Bankruptcy (1).

[Caption.]

To Clerk:

Please make transcript of following-named papers in the above-entitled matter:

First. Claim of The E. F. Company.

Second. Petition of trustee to expunge said claim.

Third. Waiver of The E. F. Company as to the filing and date of hearing of said petition.

Fourth. Proceedings before referee in the claim of The E. F Grocery Company.

Fifth. Petition of The E. F. Co. in review of referee's opinion and order expunging its claim.

Sixth. Opinion of District Judge, Hon. A. C.

Seventh, Decree filed March 28, 1902.

Eighth. Petition on appeal.

Ninth. Assignment of errors.

Tenth. Allowance of appeal.

Eleventh. Citation and service of same.

Twelfth. Motion of The E. F. Co. to correct entry of March 28th, 1902.

Thirteenth. Entry overruling same.

Fourteenth. Praecipe for transcript.

Fifteenth. Certificate.

And file said transcript with clerk of the United States Circuit Court of Appeals for the —— Circuit.

B. Y.,

Trustee in Bankruptcy.

Dated ——.

(1) As to this practice see Cunningham vs. German Ins. Bank, 103 Fed. Rep. 932.

#### No. 185.

Order that Defendant Deliver to Clerk Exhibit to be Transmitted with the Transcript to the Court of Appeals (1).

[Caption in Trial Court.]

This matter coming on to be heard upon the motion of complainant, therefor, after hearing counsel, on motion of R. X., Esq., solicitor and of counsel for complainant, it is ordered that the defendants in this cause, produce and deliver to the clerk of this court, the original trust deed marked "Exhibit I," which was produced and offered in evidence at the taking of proofs and hearing of said cause; and that the same be transmitted by the clerk of this court with the record of this case on appeal to the Circuit Court of Appeals, for inspection at the hearing and determination of said cause, and that the same be returned to defendants forthwith after said hearing.

(1) R. S. sec. 698. Original papers can be transmitted to Appellate Court only for inspection and not in lieu of a transcript of them. Smith vs. Craig, 100 U. S. 226.

#### No. 186.

# Order to send Exhibits to a Circuit Court of Appeals with Transcript.

[Caption.]

On motion of Messrs. X. & X., solicitors for complainant, it is

Ordered that in addition to the transcript of the record on appeal in this suit that the clerk of this court transmit to the clerk of the United States Circuit Court of Appeals for the —— Circuit at ——, the following original exhibits in this suit to be by him safely kept and returned to this court upon the final determination of the appeal in this suit in said Court of Appeals, viz.:

[Here name exhibits to be transmitted.]

#### No. 187.

## Order to Send Exhibits to Circuit Court of Appeals.

[Caption in District Court.

It is ordered by the court that all original exhibits produced or used at the hearing of the motion for a preliminary injunction in the District Court be forwarded to the clerk of the United States Circuit Court of Appeals for the —— Circuit at ——, to be used on the hearing of said cause in said Court of Appeals.

### No. 188.

## Stipulation that Printed Record May be Certified as Transcript

The District Court of the United States

For the — District of — Division—In Equity.

The A. B. Company; Complainant,

US.

C. D. and E. F.,

Doing Business as the C. D. Company, Defendants.

In the above entitled cause it is stipulated that the foregoing printed volume may be, by the clerk of the District Court, returned to the Circuit Court of Appeals as and for the transcript upon the appeal in this cause.

Dated ----

X. & X.,

. Solicitors for Complainant.

R. Y.,

Solicitor for Defendants.

#### No. 189.

# Stipulation to use Printed Records on a Former Writ of Error.

[Caption.]

It is agreed by counsel for both sides that this case was heard on being remanded to the record on which it was heard in this court on the former appeal by the A. B. Company, with the addition of certain letters now shown in the transcript as written by Harrison & Dortch, agents of said company, to the said company and its special agent, Kimball, from December 6th, 1896, to January 5th, or 6th, 1897; and it has heretofore been agreed, and is agreed, that the printed record in this court may be used upon this appeal, up to the action of the court in taking the case from the jury on the completion of the hearing, and that the said letters, the said action of the court, and the exceptions filed to such action only need to be printed upon this appeal; the record in this case on this appeal is the same as the record on the former appeal, with the exception of said letters introduced as evidence below, the said action of the court, and the exceptions made thereto by the plaintiffs below.

> Attorney for Appellant. R. Y., For Appellees.

#### No. 190.

# Order Extending Time Within Which to File Record in Appellate Court (1).

[Caption.]

For satisfactory reasons appearing to the court the time for filing the record in this cause in the Circuit Court of Appeals, pursuant to the appeal sued out, is extended until the day of ——.

(1) This order should be filed in trial court and sent to Appellate Court

#### No. 191.

# Appearance of U. S. in Circuit Court of Appeals Without Citation.

United States Circuit Court of Appeals

For the —— Circuit.

A. B., et al., Appellants,

US.

The United States of America, Appellee.

No. ——.

The United States come into court and say that there is no error either in the record or proceedings, or in the giving of the judgment aforesaid, and pray that the said Circuit Court of Appeals may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed.

H. C.,

United States Attorney
For the United States, Appellees.

#### No. 192.

## Motion to Dispense with Printing Record (1).

[Caption.]

Now comes the appellant [or plaintiff in error] and moves the court for leave to prosecute his appeal [or writ of error] in this court without printing the record in accordance with the rules of this court.

R. X., Attorney for Appellant.

#### No. 193.

## Order to Dispense with Printing Record (1).

[Caption.]

Upon motion of the appellant [or plaintiff in error] it is hereby ordered that the printing of the record in this court be dispensed with and no deposit made therefor.

(1) See Form No. 192.

#### No. 194.

# Order Granting Leave to use Printed Records in Making up Record in an Appellate Court.

[Caption.]

Upon the application of the appellant [or plaintiff in error] it is hereby ordered that the clerk of this court may use the records printed in the court below in making the record in this court upon the payment of the usual supervision fee.

### No. 195.

## Stipulation to Omit Parts of Record in Printing.

The United States Circuit Court of Appeals for the —— District.

A. B., Appellant, vs.
C. D., Appellee.

In the above cause it is mutually agreed between the parties signing this stipulation that the transcript of the record sent up by the clerk of the Circuit Court of the United States for the western division of the western district of Tennessee, at Memphis, shall be printed as sent up, except that the following portions thereof may be omitted:

The pages referred to are the manuscript pages of the record:

First. Subpœna in Chancery, p. 53.

Second. Marshal's service of same, p. 54.

Third. Order of continuance, p. 72.

Fourth. Order of continuance, p. 78.

Fifth. Notice of taking depositions, p. 80.

Sixth. Order of continuance, p. 82.

Seventh. Order showing plaintiff's motion to remand, p. 234.

Eighth. Opinion of Hammond, Judge, pp. 235-238.

Ninth. Order of court denying motion to remand, p. 239.

Tenth. Order setting demurrer for hearing, p. 342.

Eleventh. Order setting demurrer for hearing, p. 343.

Twelfth. Order setting demurrer for hearing, p. 344.

Thirteenth. Order setting demurrer for hearing, p. 345.

Fourteenth. Order setting demurrer for hearing, p. 346.

Fifteenth. Oder of continuance, p. 457.

Sixteenth. Notice for taking depositions, p. 478.

Seventeenth. Order of continuance, p. 480.

Eighteenth. Transcript of Record in National Revere Bank vs. Potter and others, pp. 481-499.

Nineteenth. Subpœna to answer Cross Bill, p. 546.

Twentieth. Marshal's return of service, p. 547.

Twenty-first. Exhibit "A" to Vogel's deposition, debts due to Hill Shoe Company, pp. 671-693.

Twenty-second. Exl.ibit "B" to Vogel's deposition, debts due by Hill Shoe Company, and dividends paid, pp. 694-703.

\*Twenty-third. Exhibit "B" to C. W. Edmonds' deposition being assignment of Mary T. Hill to Edmonds, provided page of the record where the assignment is previously copied is referred to in this connection. Record, pp. 756-760.

Twenty-fourth. Petition of National City Bank of New York, pp. 1035-1036.

Twenty-fifth. Deposition of W. A. Wheatley, pp. 1094-1103.

Twenty-sixth. Deposition of S. L. Moore, pp. 1126-1127.

Twenty-seventh. Order of continuance, p. 1143.

Twenty-eighth. Order of continaunce, p. 1309.

Twenty-ninth. This stipulation.

But the appellees reserve the right to insist hereafter, if material or necessary, that many parts of the record are designated to be printed by the appellants, and agreed to by them for that reason, which are not required for the purpose of the appeal.

Dated ——.

X. & X.
For Appellants.
Y. & Y.
For Appellees.

#### No. 196.

## Writ of Certiorari for Diminution of Record.1

United States Circuit Court of Appeals, for the ——Circuit.
United States of America, —— Judicial Circuit, ss.:
The President of the United States of America to the Honorable Judge of the District Court of the United States for the —— District of ——:

Whereas, there is now pending before us a suit in which S. M., receiver of the A. B. Railway Company, and the Merchantile Trust Company are appellants, and C. D., guardian of E. F., and R. H., guardian of G. H., are appellees, which suit was removed into this court by virtue of an appeal from the District Court of the United States for the —— district of ——; and, whereas, it has been suggested to this court that there is a diminution of the record in said cause because the transcript of record in this court does not contain certain record [here name the papers claimed to be omitted from the transcript], which were introduced in evidence as alleged.

We being willing that said omission or defect, if any, may be corrected, herewith return such transcript and do command that under your seal, distinctly and openly you send the record and proceedings, with all things concerning the same, as fully and entirely as they remain of record in said District Court of the United States to the United States Circuit Court of Appeals for the ——————— circuit, together with this writ forthwith.

Witness the Honorable Melville W. Fuller, chief justice of the United States, this —— day of ——, in the year of our Lord one thousand nine hundred and ——, and of the independence of the United States the one hundred and twenty[Seal.]

F. L.,

Clerk of the United States Circuit Court of Appeals for the —— Circuit.

(1) The Supreme Court is authorized by sec. 716 to issue writs of certiorari, (ex parte Vallandingham, I Wall. 243, 249,) to supply imperfections in a record of a case already before it; and, not like a writ of error, to review the judgment of an inferior court. Luxton vs. North River Bridge Co., 147 U. S. 337; U. S. vs. Young, 94 U. S. 258; ex parte Gordon, I Black 503; Beach Mod. Eq. Prac., sec. 963. See also ex parte Hitz, III U. S. 766. The Court of Appeals act did not affect this power. Am. Construc. Co. vs. Jacksonville Ry. Co., 148 U. S. 380; Sup. Ct. Rule 14.

The Circuit Courts of Appeals are vested by the act creating them with power to grant writs of *certiorari*. Act of March 3, 1891, sec. 12, 26 Stat. at L. 826; Rule 18, C. C. A.; Merrill vs. Floyd, 2 C. C. A. 58, 50 Fed. Rep. 849; Blanks vs. Klein, 1 C. C. A. 254, 49 Fed. Rep. 1; Randolph vs. Allen,

19 C. C. A. 353, 73 Fed. Rep. 23; Burnham vs. Ry. Co., 30 C. C. A. 594, 87 Fed. Rep. 168; Dow vs. U. S. 27, C. C. A. 42, 81 Fed. Rep. 1004.

#### No. 197.

## Return to Writ of Certiorari for Diminution of Record.

United States of America, — District of — In pursuance of the command of the within writ of certiorari, I, B. R., clerk of the District Court of the United States, within and for the — district of — and the — division thereof, do herewith transmit, under the seal of said court, a full and complete copy of the records referred to in the testimony taken before the master appointed in the cause of the Mercantile Trust Company against the C. & D. Railway Company, in the matter of the intervening petitions of E. F., guardian of G. H., and R. S., guardian of F. S., against said railway company, and inadvertently omitted from the record of said cause now pending on appeal in the Circuit Court of Appeals for the —— circuit, and which by the command of said writ were ordered to be returned.

In testimony whereof, I have affixed my signature as clerk of said court and the seal thereof, at ——, in said district, this —— day of ——, Anno Domini ——, and in the —— year of the independence of the United States of America.

[Seal.]

B. R.,

Clerk of the District Court of the United States for the —— District of ——.

### No. 198.

## Final Decree or Judgment on Mandate (1).

The District Court of the United States

For the —— District of ——.

A. B.

US.

C. D.

On reading and filing the mandate of the United States Circuit Court of Appeals for the —— circuit, in this cause, bearing date the —— day of ——, A. D. ——, in obedience to said mandate and in cognizance with the opinion of the said United States Circuit Court of Appeals herein, it is hereby ordered, adjudged and decreed that [here set out the proper judgment or decree according to the law and facts of the case.]

#### CERTIORARI.

### No. 199.

## Petition for Writ of Certiorari in Bankruptcy.

In the Supreme Court of the United States.

October Term, A. D. 1900.

Arthur E. Mueller, Trustee in Bankruptcy of Edward B. Nugent, Bankrupt, Petitioner,

775.

William T. Nugent, Respondent.

Petition for Writ of Certiorari, to the United States Circuit Court of Appeals for the Sixth Circuit, Requiring it to Certify to the Supreme Court of the United States, for its Revision and Determination, the Petition for Review in Bankruptcy taken by said W. T. Nugent against Arthur E. Mueller, Trustee in Bankruptcy of Edward B. Nugent, in the Matter of Wayne Knitting Mills, Belding Bros. & Co. and the German Insurance Bank vs. Edward B. Nugent, Bankrupt, in Bankruptcy, Lately Depending in said Court of Appeals.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Arthur E. Mueller, trustee in bankruptcy of Edward B. Nugent, bankrupt, filed under the provisions of section 25d of the Bankruptcy Act of 1898, respectfully represents as follows:

First. This cause involves a question entirely novel and one of the most vital importance arising under the Act of 1898—a question more far-reaching in its importance than the one decided by this court in Bardes vs. Bank, 178 U. S., page 524. Upon its determination by this court depends to a large extent the usefulness of said act.

On February 19, 1900, about the hour of 2 o'clock p. m., being more than three hours before a petition, praying for the involuntary adjudication of Edward B. Nugent, bankrupt, was filed, the respondent, W. T. Nugent, son of the bankrupt, received from the bankrupt (Edward B. Nugent), as his agent and as custodian of the fund, money belonging to the bankrupt amounting to \$14,233.95. It is nowhere claimed by the one side or relied upon by the other in this controversy that the delivery of said fund to the agent as custodian was a "transfer" or "fraudulent transfer" within the meaning of the case of Bardes vs. Bank, 178 U. S., 524.

After the adjudication, certain proceedings in contempt were had against Edward B. Nugent, the bankrupt, looking to the recovery of that fund, but because of the then condition of mind of said bankrupt he was discharged from further attendance about that matter. Upon the petition of the trustee, the referee, to whom the case had been referred, then issued a rule against said W. T. Nugent to show cause, five days after service thereof, why he should not be required to turn over said funds to the trustee. (R., p. 19.) After some months' delay, said W. T. Nugent, having been served with a copy of said order, appeared before the referee in person and by counsel, and without objecting to the time given for response, or that he was improperly or irregularly made a party, filed a response (R., p. 23) to the rule in which he objected only to the jurisdiction of the referee or the court

to issue said rule; and further responded that if he had received the said money, or any part thereof, it was before the petition in bankruptcy was filed. He also responded that by reason of the fact that he was indicted, charged with the offense of receiving said money and retaining the same and aiding and abetting in the retention thereof, after the filing of the petition in bankruptcy, he could not make further response without incriminating himself. Without waiving, but reserving, the jurisdictional question, Nugent then agreed that certain depositions of his father the bankrupt, his sisters and others should be read on the hearing of the response. (R., p. 21.) Nugent offered no proof in his own behalf.

The referee, in order to first determine whether he had jurisdiction, then heard the proof offered by the trustee and found that said Nugent had received said money only as agent and custodian of his father, the bankrupt; that he had not accounted for the same, and that said money belonged at the time of the hearing of the rule to the bankrupt's estate. No additional response was then offered by Nugent. Whereupon the referee then exercised jurisdiction and made said rule absolute and ordered Nugent to pay over the money to the trustee in bankruptcy. (R., p. 21.) Upon his failure to comply with said order, and still without additional response, the referee found him guilty of contempt and certified the case to the judge, with a recommendation that said W. T. Nugent be punished for contempt and committed until he should pay said sum. (R., p. 25.)

The respondent then filed with referee his petition for review, in pursuance of General Order No. 27 of the Supreme Court (R., p. 26), and upon the certification by the referee to the judge, showing the question presented, the summary of the evidence, and the findings and order thereon, according to said General Order 27, and form 56, a hearing was had before him. The referee also certified to the judge the depositions read on the hearing of the case, and same were before the judge.

The judge, after the hearing, rendered an opinion (R., p. 28) in which the finding of the referee was sustained, and said W. T. Nugent, being in court, he was called to the bar to receive sentence; whereupon, at the request of said W. T. Nugent by his counsel, the judge deferred passing sentence for two days. At the expiration of said two days said respondent, by his counsel, tendered an amended response (R., p. 37) in which for the first time he sought to answer, in general terms, and with conclusions of law only, that the funds in question were held and claimed by him adversely to the bankrupt or his estate. The judge, on the theory that the hearing was in the nature of an appeal from the decision of the referee, refused to permit that response to be filed, holding that it manifestly came too late (R., p. 36); that such response should have been filed before the referee at the time of the hearing upon the rule. That amended response so offered was neither filed generally nor for the purposes of appeal or review. his opinion filed, the judge, in addition to sustaining the findings of fact by the referee above recited, also found from the proof before him the following facts in this language:

"The court finds the facts of the case to be as above stated, with the addition that the entire amount, \$14,233.95, is the property of the bankrupt's estate alone; that it had been taken possession of, and was held by W. T. Nugent as the agent only of his father up to and at the time of the adjudication, and that the respondent never claimed title to any part of it, nor made any claim or right to it by reason of any attempted transfer of title or ownership therein to him at any time, either in fraud of the bankrupt's creditors or otherwise, nor has he ever claimed to have converted any part of it to his own use, nor in anywise to have claimed it adversely to the bankrupt or the trustee." (R., pp. 30-31.)

In refusing to permit said amended response to be filed, the court entered the following order:

"Came William T. Nugent, respondent herein, and tendered an amended response and moved to file same, and the court

not having postponed the imposing of the sentence for that purpose, and being of the opinion that it is not discreet or admissible practice to permit amendments upon hearings such as this, especially after the delivery of an opinion of the court, declines at this stage of the proceedings to permit a further response to be filed.

"And thereupon, pursuant to the opinion of the court filed herein on the 1st instant, it is the judgment of the court that William T. Nugent, for his contempt aforesaid, be imprisoned and confined in the county jail of Jefferson county, Kentucky, until he shall deliver or pay to Arthur E. Mueller, the trustee herein, said sum of \$14,233.95, or otherwise satisfy the said trustee with respect thereto; and the court reserves the right and power to suspend or set aside this judgment and sentence upon the delivery, payment or satisfaction aforesaid.

"To all of which the respondent, William T. Nugent, excepts." (R., p. 36.)

Thereafter said W. T. Nugent, under section 24b of the act, filed a petition in the United States Circuit Court of Appeals for review, praying that the orders, judgment and sentence of the District Court be reviewed and revised in the matter of law, etc. (R., p. 1. 1.)

After hearing said petition for review, said Circuit Court of Appeals, on the 13th day of December, 1900, entered a decree (R., p. 53) reversing and vacating the order of the District Court for the commitment of the respondent, and the order made by the referee upon the respondent to show cause, and the further order of the referee adjudging that said respondent be required to pay to the trustee the moneys alleged to be under his control, as well as the order of the referee adjudging the respondent to be in contempt; and on the same day filed a memorandum opinion (R., p. 54) and issued its forthwith mandate (R., p. 53) in direct contravention of its Rules of Court No. 29 and 32, which are as follows:

29. "A petition for rehearing after judgment can be presented only within thirty days after the day when the printed

opinion of the court is returned by the printer to the clerk, and can be obtained by counsel for the parties (which date the clerk shall note upon the appearance docket), unless by special leave granted during such thirty days, and must be printed, and briefly and distinctly state its grounds, and be supported by certificate of counsel, and will not be granted or permitted to be argued, unless a judge who concurred in the judgment desires it and a majority of the court so determine."

32. "In all cases finally determined in this court a mandate or other proper process in the nature of a *procedendo* shall be issued, on the order of this court, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.

"Such mandate shall not issue until time has elapsed for filing a petition to rehear, as defined by rule 29; and no mandate or other process or *procedendo* shall issue when a petition to rehear is pending, unless specially ordered.

"Every mandate shall be accompanied by a copy of the opinion filed in the cause in which it is issued, and the charge for the same shall be taxed in the costs of the case."

By that action W. T. Nugent was immediately released from custody, and that before this petitioner could apply for a rehearing in that court or *certiorari* here.

On the 17th day of January, 1901, said Circuit Court of Appeals filed a printed opinion in the case. (R., p. 56.)

Second. With the petition for review said W. T. Nugent filed various exhibits containing matters not part of the record in the court below, one of which was a copy of said amended response (R., p. 37), which was not a part of the record or before the referee or judge below, as shown herein above. And said petition for review further contained allegations of fact not in or shown by the record, and not before the District Court or the referee.

Among other things said petition for review contained the following allegations, to wit:

"He says that he had converted all of said money of E. B. Nugent which came into his hands to his own use, he being a creditor of said Nugent, and to the paying of the other debts of E. B. Nugent before the filing of said petition in bankruptcy or the appointment of said trustee or the adjudication therein, and that there was no evidence to the contrary, or that he had any of said money on hand or under his control when he was served herein as stated." (R., p. 6, beginning on 25th line.)

As stated, that allegation was never before the referee or the judge of the District Court, nor was it acted upon by them, but was wholly original matter, and not properly a part of the record. All the irrelevant and impertinent matter the trustee moved the Circuit Court of Appeals to expunge from the record, which motion said Court of Appeals failed to sustain or act upon; though it is contended, as appears from the opinion of that court, many of those impertinent matters, and particularly said so-called amended response, were relied upon.

Third. The Supreme Court, in Bardes vs. Bank, 178 U. S., 524, has decided that, except with the consent of the proposed defendant, the District Court has no jurisdiction to entertain an independent suit brought by a trustee in bankruptcy to set aside a fraudulent transfer made by the bankrupt to a third party, in possession of and claiming the property "as his own," and which transfer is alleged to have been fraudulent as against creditors. Except as to suing a debtor, that is all that said case does decide.

But, upon authority of that decision, the Circuit Court of Appeals has held that the District Court, which included the referee, has no jurisdiction, by summary process or rule, to compel a mere custodian of the property of a bankrupt to deliver the same to a trustee in bankruptcy when the elements of a fraudulent transfer did not exist, nor were alleged; and that, too, even though it be conceded that the legal title of said property was in the bankrupt and is vested by the Bankrupt Act in the trustee; and, too, when the custodian is asserting

no adverse title to the property; and, further, the Court of Appeals has decided that where a party makes a general assignment for the benefit of creditors, and by reason thereof is adjudged a bankrupt, the trustee in bankruptcy can not recover the property of the bankrupt from the assignee by summary process, notwithstanding the deed of assignment is made void by the adjudication in bankruptcy; but he must resort to an independent action unless there be jurisdiction upon other grounds than those arising under the bankruptcy law.

And the Court of Appeals has in effect held that the referee may not by summary procedure inquire into the nature of the custodian's holding, to ascertain if it be adverse or not; and it has further held that, though the custodian fails to assert any adverse claim, and the proof shows his holding to be amicable, the referee is nevertheless without jurisdiction to compel him to surrender the property to the trustee. These rulings it is contended are not warranted by Bardes vs. Bank, supra.

It is to review the rulings of the Circuit Court of Appeals on these questions that this petition for a writ of certiorari is applied for. The questions are of paramount importance, because, unless that decision of the Court of Appeals is reversed or materially modified, the power of the Bankruptcy Court under section 2 (6), (7) and (13) of the act to bring in and substitute additional persons or parties in proceedings in bankruptcy, when necessary for the complete determination of a matter in controversy, to cause the estate of bankrupts to be collected, reduced to money and distributed, to determine controversies in relation thereto, and to enforce obedience by bankrupts and other persons, will be almost, if not entirely, rendered nugatory.

The question in this case is not as it was in Bardes' case, whether the District Court has jurisdiction to entertain a plenary and independent suit, brought by a trustee in bankruptcy against a citizen of the same state to recover assets, the title of which is in dispute; but the question involved is

this: Can the District Court by rule compel an agent or custodian for the bankrupt or for the court, who has the mere naked possession of the bankrupt's estate, claiming no interest therein, and asserting no title thereto, to deliver such property to the trustee? Or must the trustee be compelled to resort to an ordinary action and the expense and delays incident thereto in another court to obtain possession of such property from such a custodian? Or does not the bankruptcy law provide means for the speedy and economical administration of the estate, and does not section 2 with its sub-sections exactly cover just such cases as this?

Your petitioner, with all due respect, maintains that the case of Bardes vs. Bank, supra, is not susceptible of the constructions placed upon it by the Court of Appeals, and was evidently not so intended by this court; and therefore under that authority, the Court of Appeals erred when it held, as it did in effect, that under no circumstances can the possession of property be recovered, except by an independent, plenary, dilatory and expensive suit in some other court.

Your petitioner contends that, on the contrary, the District Court has jurisdiction by summary process to require the custodian of property belonging to the bankrupt's estate, to deliver the same to the trustee, unless said custodian is holding the property adversely or claiming, in good faith, title, or at least colorable title, to said property; that the custodian is the agent or trustee of the court holding such property, and can by a rule be compelled to deliver it over to the trustee; that the mere naked possession of property without claim of title or color of title, is not sufficient to put the case at bar within the principles of the Bardes case. In fact, this court, in stating the question decided in the Bardes case, laid stress upon the point that the third party, from whom it was sought to recover the property, was holding it adversely; and that adversé holding was the foundation upon which this court based that opinion.

After diligent search petitioner has been unable to find any

definition of "adverse possession" which does not contemplate the holding by some claim or color of title.

The petition for review filed in the Court of Appeals gave that court only the power to review matters of law. (In re Purvine, 5th Circuit Court of Appeals, 96 Fed., 192.) And the Circuit Court of Appeals in this circuit has so declared in Cunningham vs. German Insurance Bank, 103 Fed., 932, and has further decided that only such matters as were acted upon by the court below could be reviewed.

So that upon the record, disregarding the impertinent matter as it reached the District Court and Circuit Court of Appeals, it was conclusively established, as matter of fact, that W. T. Nugent received said funds only as the agent or custodian of the bankrupt; that at no time until after the rendition of the opinion by the District Judge was he asserting any claim or right to or ownership in said fund; consequently the cold question of law was before the Court of Appeals as to whether or not the referee or the District Court had power by rule to compel such a custodian, claiming no title in the property, to deliver it to the trustee.

Fourth. This court, in the case of White vs. Schloerb, 178 U. S., 542, decided that a judge of the Bankruptcy Court may compel a sheriff to return goods to the judicial custody of his court, seized and taken therefrom by a sheriff in replevin proceedings.

The petitioner contends that in the case at bar, the agent's custody, being amicable and without adverse claim, placed the agent in the attitude of the sheriff in the White vs. Schloerb case; and there being no adverse claim at the time of the adjudication, trial and decision by the referee and judge, the property could not be lifted from the judicial custody by any adverse claim thereafter made.

Nugent's taking or holding the money as custodian was continuous from the moment he received it until he was ordered to pay it over; and it was at all times a holding for

the benefit of the bankrupt, and hence for the court and its officer, the trustee. There never was a break in that continuity.

In the case of *in re* Rosser, 101 Fed., 562, the Eighth Circuit Court of Appeals has held that upon adjudication all the property of the bankrupt is placed in *custodia legis*, and that the bankrupt and every other party who has the possession or control of any part of it, holds that part as agent and trustee of the court and its officer.

The Circuit Court of Appeals for the Ninth Circuit, in re Francis-Valentine Co., 94 Fed., 793, has decided that the court may summarily require a sheriff to deliver to the trustee the possession of a bankrupt's property seized within four months prior to the proceedings in bankruptcy; and in that case the court, commenting on Marshall vs. Knox, 16 Wall., 551, used this language:

"In that case a lessor of the bankrupt had caused the sheriff, under a writ of provisional seizure, to take possession of certain property of the bankrupt, which the lessor claimed the right to hold as a pledge for the payment of rent which was due him. It was held that the District Court sitting in bankruptcy has no jurisdiction to proceed by rule to take the goods from the possession of the sheriff. The court, referring to the seizure of the goods, said: 'The landlord claimed the right thus to hold possession of them until his rent was satisfied. This claim was adverse to that of the assignee.' These words quoted from the opinion fully explain the ground of the decis-It was because the claim was adverse to that of the as-In the present case the sheriff had possession, not in opposition to the right of the bankrupt nor in antagonism to its title, but his possession was based entirely upon the assumption that the title was in the bankrupt."

The court will observe that the analogy between the Valentine case and the case at bar is complete, for it is established by facts binding upon the Court of Appeals that W. T. Nugent received this money as custodian only; that the capacity of custodian was never changed, and that he was asserting no

adverse claim or title thereto; but, in the words of the Court of Appeals for the Ninth Circuit, Nugent "had possession, not in opposition to the right of the bankrupt, nor in opposition to his title, but his possession was based entirely upon the assumption that the title was in the bankrupt." The District Courts in Vermont, New York and West Virginia, which decisions are the law in those districts respectively, have also sustained the right to issue such rules. (In re Brooks, 91 Fed., 518; in re Raymond W. Kenney, 95 Fed., 427; in re Moore, 104 Fed., 869.) Then, too, it is contended the opinion of the Court of Appeals is in conflict with White vs. Schloerb, 178 U. S., 542.

In re Ward, 104 Fed., 985, it was sought to obtain an injunction against one O'Donald from disposing of certain "funds and credits due" to the bankrupt and which were in the possession of the said O'Donald. Judge Lowell, of the Massachusetts district, basing his opinion upon the case of Bardes vs. Bank refused to grant the injunction, and commenting on the cases of Bardes vs. Bank and White vs. Schloerb, closes his opinion with the following language:

"It is greatly to be desired that a further exposition of the jurisdiction of the District Court in bankruptcy should be made as speedily as possible by the Supreme Court, and if counsel for the petitioners shall desire to take this case directly to the Supreme Court, as is provided by section 5 of the Judiciary Act of 1891, 26 Stat., 827, I will gladly facilitate proceedings to that end."

And so it is that your petitioner contends that by reason or the decision in the case at bar, and the others so cited, there is a contrariety of opinion, and not a uniform administration of the Bankruptcy Act (as necessary as uniformity in the act itself, required by section 8, sub-section 4, Article I., of the constitution of the United States) as to the grave and important question, to wit: The right of the court of bankruptcy to summarily order in property which is admittedly assets of

a bankrupt's estate and which the holder thereof is not claiming as his own.

Your petitioner appends hereto his brief in support of this petition.

Wherefore, your petitioner prays that a writ of certiorari may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record in all proceedings in said Circuit Court of Appeals in the case therein, entitled "The Wayne Knitting Mills, Belding Brothers & Company and the German Insurance Bank, against E. B. Nugent, bankrupt, on petition of W. T. Nugent for review, No. 920," to the end that said case may be reviewed and determined by this court, as provided by law; and that the judgment of the said Circuit Court of Appeals in said case may be modified so as to deny the petition for review filed by said W. T. Nugent to that court in bankruptcy.

And your petitioner will ever pray.

William W. Watts, John Richard Watts, Counsel for Petitioner.

State of Kentucky, Jefferson County, Sct.

William W. Watts, being duly sworn, says that he is one of the counsel for Arthur E. Mueller, trustee in bankruptcy of Edward B. Nugent, bankrupt, the petitioner named; that he has read the foregoing petition, and the facts therein stated are true, as he believes.

William W. Watts.

Subscribed and sworn to before me this 29th day of January, A. D. 1901. My commission as Notary Public expires on the 12th day of January, A. D. 1904.

E. B. Kerr,

[Seal.] Notary Public within and for County of Jefferson, State of Kentucky.

(1) Taken from the record in Nugent vs. U.S., 184 U.S. 1.

# THE ACT OF 1867.

## The Bankruptcy Law of 1867.

#### CHAPTER ONE.

COURTS OF BANKRUPTCY, THEIR JURISDICTION, ORGANIZATION, AND POWERS.

Scope of the jurisdiction of courts of bankruptcy. Sec. 4972. The jurisdiction conferred upon the district courts as courts of bankruptcy shall extend:

First. To all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy.

Second. To the collection of all the assets of the bankrupt.

Third. To the ascertainment and liquidation of the liens and other specific claims thereon.

Fourth. To the adjustment of the various priorities and conflicting interests of all parties.

Fifth. To the marshaling and disposition of the different funds and assets, so as to secure the rights of all parties and due distribution of the assets among all the creditors.

Sixth. To all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement

<sup>1</sup>The text is taken from the Revised Statutes of the United States, edition of 1878. The original act of 1867 was passed March 2, 1867 (14 Stat. at L. 517) and the principal amendment to this act was passed June 22, 1874 (18 Stat. at L. 178). Contemporaneously with the passage of the amendatory act of June 22, 1874, amending by specific reference the bankrupt act of 1867, congress enacted a complete substitute for the act, as Title sixtyone of the statutes, and repealed the act in common with other general and permanent acts. The amendatory act has been incorporated in the revised edition of

the statutes of 1878 and will therefore be included in the text. (See preface to edition of 1878). The effect of passing the amendment and the revised statutes on the same day caused some confusion in construing them. See In re Oregon Bul. Printing & Pub. Co. No. 10558 Fed. Cas., S. C. 13 N. B. R. 199; In re Townsend 2 Fed. Rep. 559; Brown v. White 16 Fed. Rep. 200. A list of all the amendatory acts may be found on Page 12 ante.

This statute was repealed by the act of June 7, 1878, to take effect Sept. 1, 1878, 20 Stat. at L. 99.

of the estate of the bankrupt, and the close of the proceedings in bankruptcy.

Authority of district courts and judges. Sec. 4973. The district courts shall be always open for the transaction of business in the exercise of their jurisdiction as courts of bankruptcy; and their powers and jurisdiction as such courts shall be exercised as well in vacation as in term time; and a judge sitting at chambers shall have the same powers and jurisdiction, including the power of keeping order and of punishing any contempt of his authority, as when sitting in court.

Sessions of the district courts. Sec. 4974. A district court may sit for the transaction of business in bankruptcy, at any place within the district, of which place and of the time of commencing session the court shall have given notice, as well as at the places designated by law for holding sessions of such court.

Power of district courts to compel obedience. See. 4975. The district courts as courts of bankruptcy shall have full authority to compel obedience to all orders and decrees passed by them in bankruptcy, by process of contempt and other remedial process, to the same extent that the circuit courts now have in any suit pending therein in equity.

Powers of circuit judge during absence, sickness, or disability of district judge. Sec. 4976. In case of a vacancy in the office of district judge in any district, or in case any district judge shall, from sickness, absence, or other disability, be unable to act, the circuit judge of the circuit in which such district is included may make, during such disability or vacancy, all necessary rules and orders preparatory to the final hearing of all causes in bankruptcy, and cause the same to be entered or issued, as the case may require, by the clerk of the district court.

Powers of the supreme court for the District of Columbia. Sec. 4977. The same jurisdiction, power, and authority which are hereby conferred upon the district courts in cases of bankruptcy are also conferred upon the supreme court of the District of Columbia, when the bankrupt resides in that District.

Powers of the supreme courts for the Territories. Sec. 4978. The same jurisdiction, power, and authority which are hereby conferred upon the district courts in cases of bankruptcy are also conferred upon the supreme courts of the several Territories when the bankrupt resides in either of the Territories. This jurisdiction may be exercised, upon petitions regularly filed in such courts, by either of the justices thereof while holding the district court in the district in which the petitioner or the alleged bankrupt resides.

Jurisdiction of actions between assignees and persons claiming adverse interests. Sec. 4979. The several circuit courts shall have within each district concurrent jurisdiction with the district court, whether the powers and jurisdiction of a circuit court have been conferred on such district court or not, of all suits at law or in equity brought by an assignee in bankruptcy against any person claiming

an adverse interest, or by any such person against an assignee, touching any property or rights of the bankrupt transferable to or vested in such assignee.

Appeals to circuit court. Sec. 4980. Appeals may be taken from the district to the circuit courts in all cases in equity, and writs of error from the circuit courts to the district courts may be allowed in cases at law, arising under or authorized by this Title, when the debt or damages claimed amount to more than five hundred dollars; and any supposed creditor, whose claim is wholly or in part rejected, or an assignee who is dissatisfied with the allowance of a claim, may appeal from the decision of the district court to the circuit court for the same district.

How taken. Sec. 4981. No appeal shall be allowed in any case from the district to the circuit court unless it is claimed, and notice given thereof to the clerk of the district court, to be entered with the record of the proceedings, and also to the assignee or creditor, as the case may be, or to the defeated party in equity, within ten days after the entry of the decree or decision appealed from; nor unless the appellant at the time of claiming the same shall give bond in the manner required in cases of appeals in suits in equity; nor shall any writ of error be allowed unless the party claiming it shall comply with the provisions of law regulating the granting of such writs.

How entered. Sec. 4982. Such appeal shall be entered at the term of the circuit court which shall be held within the district next after the expiration of ten days from the time of claiming the same.

Waiver of appeal. SEC. 4983. If the appellant, in writing, waives his appeal before any decision thereon, proceedings may be had in the district court as if no appeal had been taken.

Appeal from decision rejecting claim. Sec. 4984. A supposed creditor who takes an appeal to the circuit court from the decision of the district court, rejecting his claim in whole or in part, shall, upon entering his appeal in the circuit court, file in the clerk's office thereof a statement in writing of his claim, setting forth the same, substantially, as in a declaration for the same cause of action at law, and the assignee shall plead or answer thereto in like manner, and like proceeding shall thereupon be had in the pleadings, trial, and determination of the cause, as in actions at law commenced and prosecuted, in the usual manner, in the courts of the United States, except that no execution shall be awarded against the assignee for the amount of a debt found due to a creditor.

Costs. Sec. 4985. The final judgment of the circuit court, rendered upon any appeal provided for in the preceding section, shall be conclusive, and the list of debts shall, if necessary, be altered to conform thereto. The party prevailing in the suit shall be entitled to costs against the adverse party, to be taxed and recovered as in suits at law; if recovered against the assignee, they are to be allowed out of the estate.

Power of general superintendence conferred on circuit court. SEC. 4986. The circuit court for each district shall have a general superintendence and jurisdiction of all cases and questions arising in the district court for such district when sitting as a court of bankruptcy, whether the powers and jurisdiction of a circuit court have been conferred on such district court or not; and except when special provision is otherwise made, may, upon bill, petition, or other proper process, of any party aggrieved, hear and determine the case as in a court of equity; and the powers and jurisdiction hereby granted may be exercised either by the court in term time, or, in vacation, by the circuit justice or by the circuit judge of the circuit.

Superintendence by supreme courts of Territories. Sec. 4987. The several supreme courts of the Territories shall have the same general superintendence and jurisdiction over the acts and decisions of the justices thereof in cases of bankruptcy as is conferred on the circuit courts over proceedings in the district courts.

Power of district judge in a district not within any organized circuit. SEC. 4988. In districts which are not within any organized circuit of the United States, the power and jurisdiction of a circuit court in bankruptcy may be exercised by the district judge.

Appeal and writ of error to Supreme Court. Sec. 4989. No appeal or writ of error shall be allowed in any case arising under this Title from the circuit court to the Supreme Court, unless the matter in dispute in such case exceeds two thousand dollars.

Supreme Court may prescribe rules. Sec. 4990. The general orders in bankruptcy heretofore adopted by the justices of the Supreme Court, as now existing, may be followed in proceedings under this Title; and the justices may, from time to time, subject to the provisions of this Title, rescind or vary any of those general orders, and may frame, rescind, or vary other general orders, for the following purposes:

First. For regulating the practice and procedure of the district courts in bankruptcy, and the forms of petitions, orders, and other proceedings to be used in such courts in all matters under this Title.

Second. For regulating the duties of the various officers of such courts.

Third. For regulating the fees payable and the charges and costs to be allowed, except such as are established by this Title or by law, with respect to all proceedings in bankruptcy before such courts, not exceeding the rate of fees now allowed by law for similar services in other proceedings.

Fourth. For regulating the practice and procedure upon appeals.

Fifth. For regulating the filing, custody, and inspection of records. Sixth. And generally for carrying the provisions of this Title into effect.

All such general orders shall from time to time be reported to Congress, with such suggestions as the justices may think proper.

What constitutes commencement of proceedings. Sec. 4991. The filing of the petition for an adjudication in bankruptcy, either by a debtor in his own behalf, or by any creditor against a debtor, shall be deemed to be the commencement of proceedings in bankruptcy.

Records of bankruptcy proceedings. SEC. 4992. The proceedings in all cases of bankruptcy shall be deemed matters of record, but the same shall not be required to be recorded at large, but shall be carefully filed, kept, and numbered in the office of the clerk of the court, and a docket only, or short memorandum thereof, kept in books to be provided for that purpose, which shall be open to public inspection. Copies of such records, duly certified under the seal of the court, shall in all cases be presumptive evidence of the facts therein stated.

Registers in bankruptcy. Sec. 4993. Each district judge shall appoint, upon the nomination and recommendation of the Chief Justice of the Supreme Court, one or more registers in bankruptcy, when any vacancy occurs in such office, to assist him in the performance of his duties, under this Title, unless he shall deem the continuance of the particular office unnecessary.

Who are eligible. SEC. 4994. No person shall be eligible for appointment as register in bankruptcy, unless he is a counselor of the district court for the district in which he is appointed, or of some one of the courts of record of the State in which he resides.

Qualification. Sec. 4995. Before entering upon the duties of his office, every person appointed a register in bankruptcy shall give a bond to the United States, for the faithful discharge of the duties of his office, in a sum not less than one thousand dollars, to be fixed by the district judge, with sureties satisfactory to such judge; and he shall, in open court, take and subscribe the oath prescribed in section seventeen hundred and fifty-six, Title, "Provisions applicable to several classes of officers," and also an oath that he will not, during his continuance in office, be, directly or indirectly, interested in or benefited by the fees or emoluments arising from any suit or matter pending in bankruptcy, in either the district or circuit court in his district.

Restrictions upon registers. Sec. 4996. No register shall be counsel or attorney, either in or out of court, in any suit or matter pending in bankruptcy in either the circuit or district court of his district, nor in an appeal therefrom; nor shall he be executor, administrator, guardian, commissioner, appraiser, divider, or assignee of or upon any estate within the jurisdiction of either of those courts as courts of bankruptcy, nor shall he be interested in the fees or emoluments arising from any such trusts.

Removal of registers. SEC. 4997. Registers are subject to removal from office by the judge of the district court.

Powers of registers. Sec. 4998. Every register in bankruptcy has power:

First. To make adjudication of bankruptcy in cases unopposed.

Second. To receive the surrender of any bankrupt.

Third. To administer oaths in all proceedings before him.

Fourth. To hold and preside at meetings of creditors.

Fifth. To take proof of debts.

Sixth. To make all computations of dividends, and all orders of distribution.

Seventh. To furnish the assignee with a certified copy of such orders, and of the schedules of creditors and assets filed in each case.

Eighth. To audit and pass accounts of assignees.

Ninth. To grant protection.

Tenth. To pass the last examination of any bankrupt in cases whenever the assignee or a creditor do not oppose.

Eleventh. To sit in chambers and dispatch there such part of the administrative business of the court and such uncontested matters as shall be defined in general rules and orders, or as the district judge shall in any particular matter direct.

Limitations upon powers of registers. Sec. 4999. No register shall have power to commit for contempt, or to make adjudication of bank-ruptcy when opposed; or to decide upon the allowance or suspension of an order of discharge.

Registers to keep memoranda of proceedings. Sec. 5000. Every register shall make short memoranda of his proceedings in each case in which he acts, in a docket to be kept by him for that purpose, and shall forthwith, as the proceedings are taken, forward to the clerk of the district court a certified copy of these memoranda, which shall be entered by the clerk in the proper minute-book to be kept in his office.

Registers to attend at place directed by judge. Sec. 5001. The judge of the district court may direct a register to attend at any place within the district for the purpose of hearing such voluntary applications under this Title as may not be opposed, of attending any meeting of creditors, or receiving any proofs of debts, and, generally, for the prosecution of any proceedings under this Title.

Power to summon witnesses. Sec. 5002. Every register, so acting, shall have and exercise all powers, except the power of commitment, vested in the district court for the summoning and examination of persons or witnesses, and for requiring the production of books, papers, and documents.

Mode of taking evidence. Sec. 5003. Evidence or examination in any of the proceedings under this Title may be taken before the court, or a register in bankruptcy, viva voce or in writing, before a commissioner of the circuit court, or by affidavit, or on commission, and the court may direct a reference to a register in bankruptcy, or other suitable person, to take and certify such examination, and may compel the attendance of witnesses, the production of books and papers, and the giving of testimony in the same manner as in suits in equity in the circuit court.

Depositions and acts to be reduced to writing. Sec. 5004. All depositions of persons and witnesses taken before a register, and all acts done by him, shall be reduced to writing, and be signed by him, and shall be filed in the clerk's office as part of the proceedings. He shall have power to administer oaths in all cases and in relation to all matters in which oaths may be administered by commissioners of circuit courts.

Witnesses must attend. Sec. 5005. Parties and witnesses summoned before a register shall be bound to attend in pursuance of such summons at the time and place designated therein, and shall be entitled to protection, and be liable to process of contempt in like manner as parties and witnesses are now liable thereto in case of default in attendance under any writ of subpœna.

Contempt before register. Sec. 5006. Whenever any person examined before a register refuses or declines to answer, or to swear to or sign his examination when taken, the register shall refer the matter to the judge, who shall have power to order the person so acting to pay the costs thereby occasioned, and to punish him for contempt, if such person be compellable by law to answer such question or to sign such examination.

Registers may act for each other. Sec. 5007. Any register may act in the place of any other register appointed by and for the same district court.

Payment of fees of registers. Sec. 5008. The fees of registers, as established by law or by rules and orders framed pursuant to law, shall be paid to them by the parties for whom the services may be rendered.

Contested issues to be decided by judge. Sec. 5009. In all matters where an issue of fact or of law is raised and contested by any party to the proceedings before any register, he shall cause the question or issue to be stated by the opposing parties in writing, and he shall adjourn the same into court for decision by the judge.

Certificates of matters to be decided by judge. Sec. 5010. Any party shall, during the proceedings before a register, be at liberty to take the opinion of the district judge upon any point or matter arising in the course of such proceedings, or upon the result of such proceedings, which shall be stated by the register in the shape of a short certificate to the judge, who shall sign the same if he approve thereof; and such certificate, so signed, shall be binding on all the parties to the proceeding; but every such certificate may be discharged or varied by the judge at chambers or in open court.

Appeal from judge's decision upon questions submitted. Sec. 5011. In any proceedings within the jurisdiction of the court, under this Title, the parties concerned, or submitting to such jurisdiction, may at any stage of the proceedings, by consent, state any questions in a special case for the opinion of the court, and the judgment of the court shall be final unless it is agreed and stated in the special case

that either party may appeal, if, in such case, an appeal is allowed by this Title. The parties may also, if they think fit, agree, that upon the questions raised by such special case being finally decided, a sum of money, fixed by the parties, or to be ascertained by the court, or in such manner as the court may direct, or any property, or the amount of any disputed debt or claim, shall be paid, delivered, or transferred by one of such parties to the other of them, either with or without costs.

Penalties against officers. Sec. 5012. If any judge, register, clerk, marshal, messenger, assignee, or any other officer of the several courts of bankruptcy shall, for anything done or pretended to be done under this Title, or under color of doing anything thereunder, wilfully demand or take, or appoint or allow any person whatever to take for him or on his account, or for or on account of any other person, or in trust for him or for any other person, any fee, emolument, gratuity, sum of money, or anything of value whatever, other than is allowed by law, such person shall forfeit and pay a sum not less than three hundred dollars and not more than five hundred dollars, and be imprisoned not exceeding three years.

Meaning of terms and computation of time. SEC. 5013. In this Title the word "assignee," and the word "creditor," shall include the plurat also; and the word "messenger," shall include his assistant or assistants, except in the provision for the fees of that officer, The word "marshal," shall include the marshal's deputies; the word "person" " all also include "corporation;" and the word "oath" shall include "affirmation." And in all cases in which any particular number of days is prescribed by this Title, or shall be mentioned in any rule or order of court or general order which shall at any time be made under this Title, for the doing of any act, or for any other purpose, the same shall be reckoned, in the absence of any expression to the contrary, exclusive of the first and inclusive of the last day, unless the last day shall fall on Sunday, Christmas Day, or on any day appointed by the President of the United States as a day of public fast or thanksgiving, or on the Fourth of July, in which case the time shall be reckoned exclusive of that day also.

#### CHAPTER TWO.

#### VOLUNTARY BANKRUPTCY.

Petition and schedules. Sec. 5014. If any person residing within the jurisdiction of the United States, and owing debts provable in bankruptcy exceeding the amount of three hundred dollars, shall apply by petition addressed to the judge of the judicial district in which such debtor has resided or carried on business for the six months next preceding the time of filing such petition, or for the longest period during such six months, setting forth his place of res-

idence, his inability to pay all his debts in full, his willingness to surrender all his estate and effects for the benefit of his creditors, and his desire to obtain a discharge from his debts, and shall annex to his petition a schedule and inventory, in compliance with the next two sections, the filing of such petition shall be an act of bankruptcy, and such petitioner shall be adjudged a bankrupt.

Schedule of debts. Sec. 5015. The said schedule must contain a full and true statement of all his debts, exhibiting, as far as possible, to whom each debt is due, the place of residence of each creditor, if known to the debtor, and if not known the fact that it is not known; also the sum due to each creditor; the nature of each debt or demand, whether founded on written security, obligation, or contract, or otherwise; the true cause and consideration of the indebtedness in each case, and the place where such indebtedness accrued; and also a statement of any existing mortgage, pledge, lien, judgment, or collateral or other security given for the payment of the same.

Inventory of property. Sec. 5016. The said inventory must contain an accurate statement of all the petitioner's estate, both real and personal, assignable under this Title, describing the same and stating where it is situated, and whether there are any, and, if so, what incumbrances thereon.

Oath to petition and schedule. Sec. 5017. The schedule and inventory must be verified by the oath of the petitioner, which may be taken either before the district judge, or before a register, or before a commissioner of the circuit court.

Oath of allegiance. Sec. 5018. Every citizen of the United States petitioning to be declared bankrupt shall, on filing his petition, and before any proceedings thereon, take and subscribe an oath of allegiance and fidelity to the United States, which oath may be taken before either of the officers mentioned in the preceding section, and shall be filed and recorded with the proceedings in bankruptcy.

Warrant to marshal. Sec. 5019. Upon the filing of such petition, schedule, and inventory, the judge or register shall forthwith, if he is satisfied that the debts due from the petitioner exceed three hundred dollars, issue a warrant, to be signed by such judge or register, directed to the marshal for the district, authorizing him forthwith, as messenger, to publish notices in such newspapers as the warrant specifies; to serve written or printed notice, by mail or personally, on all creditors upon the schedule filed with the debtor's petition, or whose names may be given to him in addition by the debtor; and to give such personal or other notice to any persons concerned as the warrant specifies.

Amendment of schedule. Sec. 5020. Every bankrupt shall be at liberty, from [time] to time, upon oath to amend and correct his schedule of creditors and property, so that the same shall conform to the facts.

Acts of bankruptcy. SEC. 5021. Any person residing within the

jurisdiction of the United States and owing debts provable in bankruptcy exceeding the amount of three hundred dollars:

First. Who departs from the State, district, or Territory of which he is an inhabitant with intent to defraud his creditors, or, being absent, remains absent with such intent; or,

Second. Who conceals himself to avoid the service of legal process in any action for the recovery of a debt or demand provable in bankruptcy; or,

Third. Who conceals or removes any of his property to avoid its being attached, taken, or sequestered on legal process; or,

Fourth. Who makes any assignment, gift, sale, conveyance, or transfer of his estate, property, rights, or credits, either within the United States or elsewhere, with intent to delay, defraud, or hinder his creditors; or,

Fifth. Who has been arrested and held in custody under or by virtue of mesne process or execution, issued out of any court of any State, district, or Territory within which such debtor resides or has property, founded upon a demand in its nature provable against a bankrupt's estate, and for a sum exceeding one hundred dollars, if such process is remaining in force and not discharged by payment, or in some other manner provided by the law of such State, district, or Territory applicable thereto, for a period of seven days; or,

Sixth. Who has been actually imprisoned for more than seven days in a civil action founded on contract, for the sum of one hundred dollars or upward; or,

Seventh. Who, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, makes any payment, gift, grant, sale, conveyance, or transfer of money or other property, estate, rights, or credits, or gives any warrant to confess judgment; or procures or suffers his property to be taken on legal process, with intent to give a preference to one or more of his creditors, or to any person or persons who are or may be liable for him as indorsers, bail, sureties, or otherwise, or with the intent by such disposition of his property, to defeat or delay the operation of this act; or,

Eighth. Who, being a banker, broker, merchant, trader, manufacturer, or miner, has fraudulently stopped payment, or who has stopped or suspended and not resumed payment of his commercial paper, within a period of fourteen days, shall be deemed to have committed an act of bankruptcy, and to have become liable to be adjudged a bankrupt. And if such person shall be adjudged a bankrupt, the assignee, may recover back the money or other property so paid, conveyed, sold, assigned, or transferred contrary to this Title, provided the person receiving such payment or conveyance had reasonable cause to believe that a fraud on this Title was intended, and that the debtor was insolvent, and such creditor shall not be allowed to prove his debt in bankruptcy.

Prior acts of bankruptcy. SEC. 5022. Any act of bankruptcy com-

mitted since the second day of March, eighteen hundred and sixty-seven, may be the foundation of an adjudication of involuntary bank-ruptcy, upon a petition filed within the time prescribed by law, equally with one committed hereafter.

Who may file petition. Sec. 5023. An adjudication of bankruptcy may be made on the petition of one or more creditors, the aggregate of whose provable debts amounts to at least two hundred and fifty dollars, provided such petition is brought within six months after the act of bankruptcy shall have been committed.

Proceedings after filing the petition. SEC. 5024. Upon the filing of the petition authorized by the preceding section, if it appears that sufficient grounds exist therefor, the court shall direct the entry of an order requiring the debtor to appear and show cause, at a court of bankruptcy to be holden at a time to be specified in the order, not less than five days from the service thereof, why the prayer of the petition should not be granted. The court may also, by injunction restrain the debtor, and any other person, in the mean time, from making any transfer or disposition of any part of the debtor's property not excepted by this Title from the operation thereof and from any interference therewith; and if it shall appear that there is probable cause for believing that the debtor is about to leave the district, or to remove . or conceal his goods and chattels or his evidence of property, or to make any fraudulent conveyance or disposition thereof, the court may issue a warrant to the marshal of the district, commanding him to arrest and safely keep the alleged debtor, unless he shall give bail to the satisfaction of the court for his appearance from time to time, as required by the court, until its decision upon the petition, or until its further order, and forthwith to take possession provisionally of all the property and effects of the debtor, and safely keep the same until the further order of the court.

Service of order to show cause. Sec. 5025. A copy of the petition and order to show cause shall be served on the debtor by delivering the same to him personally, or leaving the same at his last or usual place of abode; or, if the debtor can not be found, and his place of residence can not be ascertained, service shall be made by publication in such manner as the judge may direct. No further proceedings, unless the debtor appears and consents thereto, shall be had until proof has been given, to the satisfaction of the court, of such service or publication; and if such proof is not given on the return day of such order, the proceedings shall be adjourned and an order made that the notice be forthwith so served or published.

Proceedings on return day. Sec. 5026. On such return day or adjourned day, if the notice has been duly served or published, or is waived by the appearance and consent of the debtor, the court shall proceed summarily to hear the allegations of the petitioner and debtor, and may adjourn the proceedings from time to time, on good cause shown, and shall, if the debtor on the same day so demands, in writ-

ing, order a trial by jury at the first term of the court at which a jury shall be in attendance, to ascertain the fact of the alleged bankruptcy. If the petitioning creditor does not appear and proceed on the return day, or adjourned day, the court may upon the petition of any other creditor, to the required amount, proceed to adjudicate on such petition, without requiring a new service or publication of notice to the debtor.

Costs at trial. Sec. 5027. If upon such hearing or trial the debtor proves to the satisfaction of the court or of the jury, as the case may be, that the facts set forth in the petition are not true, or that the debtor has paid and satisfied all liens upon his property, in case the existence of such liens was the sole ground of the proceeding, the proceedings shall be dismissed and the respondent shall recover costs.

Warrant. Sec. 5028. If upon the hearing or trial the facts ser forth in the petition are found to be true, or if upon default made by the debtor to appear pursuant to the order, due proof of service thereof is made, the court shall adjudge the debtor to be a bankrupt, and shall forthwith issue a warrant to take possession of his estate.

Distribution of property of debtor. Sec. 5029. The warrant shall be directed, and the property of the debtor shall be taken thereon, and shall be assigned and distributed in the same manner and with similar proceedings to those [hereinbefore] [hereinafter] provided for the taking possession, assignment, and distribution of the property of the debtor upon his own petition.

Schedule and inventory. Sec. 5030. The order of adjudication of bankruptcy shall require the bankrupt forthwith, or within such number of days not exceeding five after the date of the order or notice thereof, as shall by the order be prescribed, to make and deliver, or transmit by mail, postpaid, to the messenger, a schedule of the creditors and an inventory of his estate in the form and verified in the manner required of a petitioning debtor.

Proceedings when debtor is absent. Sec. 5031. If the debtor has failed to appear in person, or by attorney, a certified copy of the adjudication shall be forthwith served on him by delivery or publication in the manner provided for the service of the order to show cause; and if the bankrupt is absent or can not be found, such schedule and inventory shall be prepared by the messenger and the assignee from the best information they can obtain.

#### CHAPTER FOUR.

PROCEEDINGS TO REALIZE THE ESTATE FOR CREDITORS.

Contents of notice to creditors. SEC. 5032. The notice to creditors under warrant shall state:

First. That a warrant in bankruptcy has been issued against the estate of the debtor.

Second. That the payment of any debts and the delivery of any property belonging to such debtor to him or for his use, and the transfer of any property by him, are forbidden by law.

Third. That a meeting of the creditors of the debtor, giving the names, residences, and amounts, so far as known, to prove their debts and choose one or more assignees of his estate, will be held at a court of bankruptcy, to be holden at a time and place designated in the warrant, not less than ten nor more than ninety days after the issuing of the same.

Marshal's return. Sec. 5033. At the meeting held in pursuance of the notice, one of the registers of the court shall preside, and the messenger shall make return of the warrant and of his doings thereon; and if it appears that the notice to the creditors has not been given as required in the warrant, the meeting shall forthwith be adjourned, and a new notice given as required.

Choice of assignee. Sec. 5034. The creditors shall, at the first meeting held after due notice from the messenger in presence of the register designated by the court, choose one or more assignees of the estate of the debtor; the choice to be made by the greater part in value and in number of the creditors who have proved their debts. If no choice is made by the creditors at the meeting, the judge, or if there be no opposing interest, the register, shall appoint one or more assignees. If an assignee, so chosen or appointed, fails within five days to express in writing his acceptance of the trust, the judge or register may fill the vacancy. All elections or appointments of assignees shall be subject to the approval of the judge; and when in his judgment it is for any cause needful or expedient, he may appoint additional assignees, or order a new election.

Who are disqualified. Sec. 5035. No person who has received any preference contrary to the provisions of this Title shall vote for or be eligible as assignee; but no title to property, real or personal, sold, transferred, or conveyed by an assignee, shall be affected or impaired by reason of his ineligibility.

Bond of assignee. Sec. 5036. The district judge at any time may, and upon the request in writing of any creditor who has proved his claim shall, require the assignee to give good and sufficient bond to the United States, with a condition for the faithful performance and discharge of his duties; the bond shall be approved by the judge or register by his indorsement thereon, shall be filed with the record of the case, and inure to the benefit of all creditors proving their claims, and may be prosecuted in the name and for the benefit of any injured party. If the assignee fails to give the bond within such time as the judge or register orders, not exceeding ten days after notice to him of such order, the judge shall remove him and appoint another in his place.

Assignee liable for contempt. SEC. 5037. Any assignee who refuses or unreasonably neglects to execute an instrument when lawfully re-

quired by the court, or disobeys a lawful order or decree of the court in the premises, may be punished as for a contempt of court.

Resignation of the trust. Sec. 5038. An assignee may, with the consent of the judge, resign his trust and be discharged therefrom.

Removal of assignee, Sec. 5039. The court, after due notice and hearing, may remove an assignee for any cause which, in its judgment, renders such removal necessary or expedient. At a meeting called for the purpose by order of the court, in its discretion, or called upon the application of a majority of the creditors in number and value, the creditors may, with consent of the court, remove any assignee by such a vote as is provided for the choice of assignee.

Effect of resignation or removal. Sec. 5040. The resignation or removal of an assignee shall in no way release him from performing all things requisite on his part for the proper closing up of his trust and the transmission thereof to his successors, nor shall it affect the liability of the principal or surety on the bond given by the assignee.

Filling vacancies. Sec. 5041. Vacancies caused by death or otherwise in the office of assignee may be filled by appointment of the court, or at its discretion by an election by the creditors, in the same manner as in the original choice of an assignee, at a regular meeting, or at a meeting called for the purpose, with such notice thereof in writing to all known creditors, and by such person as the court shall direct.

Vesting estate in remaining assignee. Sec. 5042. When, by death or otherwise, the number of assignees is reduced, the estate of the debtor not lawfully disposed of shall vest in the remaining assignee or assignees, and in the persons selected to fill vacancies, if any, with the same powers and duties relative thereto as if they were originally chosen.

Former assignee to execute instruments. Sec. 5043. Any former assignee, his executors and administrators, upon request, and at the expense of the estate, shall make and execute to the new assignee all deeds, conveyances, and assurances, and do all other lawful acts requisite to enable him to recover and receive all the estate. And the court may make all orders which it may deem expedient to secure the proper fulfillment of the duties of any former assignee, and the rights and interests of all persons interested in the estate.

Assignment. Sec. 5044. As soon as an assignee is appointed and qualified, the judge, or where there is no opposing interest, the register, shall by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books, and papers relating thereto, and such assignment shall relate back to the commencement of the proceedings in bankruptcy, and by operation of law shall vest the title to all such property and estate, both real and personal, in the assignee, although the same is then attached on mesne process as the property of the debtor,

and shall dissolve any such attachment made within four months next preceding the commencement of the bankruptcy proceedings.

Exemptions. Sec. 5045. There shall be exempted from the operation of the conveyance the necessary household and kitchen furniture, and such other articles and necessaries of the bankrupt as the assignee shall designate and set apart, having reference in the amount to the family, condition, and circumstances of the bankrupt, but altogether not to exceed in value, in any case, the sum of five hundred dollars; also the wearing apparel of the bankrupt, and that of his wife and children, and the uniform, arms, and equipments of any person who is or has been a soldier in the militia, or in the service of the United States; and such other property as now is, or hereafter shall be, exempted from attachment, or seizure, or levy on execution by laws of the United States, and such other property not included in the foregoing exceptions as is exempted from levy and sale upon execution or other process or order of any court by the laws of the State in which the bankrupt has his domicile at the time of the commencement of the proceedings in bankruptcy, to an amount allowed by the constitution and laws in each State, as existing in the year eighteen hundred and seventy-one; and such exemptions shall be valid against debts contracted before the adoption and passage of such State constitution and laws, as well as those contracted after the same, and against liens by judgment or decree of any State court, any decision of any such court rendered since the adoption and passage of such constitution and laws to the contrary notwithstanding. These exceptions shall operate as a limitation upon the conveyance of the property of the bankrupt to his assignee; and in no case shall the property hereby excepted pass to the assignee, or the title of the bankrupt thereto be impaired or affected by any of the provisions of this Title; and the determination of the assignee in the matter shall, on exception taken, be subject to the final decision of the said court.

What property vests in assignee. Sec. 5046. All property conveyed by the bankrupt in fraud of his creditors; all rights in equity, choses in action, patent-rights, and copy-rights; all debts due him, or any person for his use, and all liens and securities therefor; and all his rights of action for property or estate, real or personal; and for any cause of action which he had against any person arising from contract or from the unlawful taking or detention, or injury to the property of the bankrupt; and all his rights of redeeming such property or estate; together with the like right, title, power and authority to sell, manage, dispose of, sue for, and recover or defend the same, as the bankrupt might have had if no assignment had been made, shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, but subject to the exceptions stated in the preceding section, be at once vested in such assignee.

Right of action of assignee. Sec. 5047. The assignee shall have the like remedy to recover all the estate, debts, and effects in his own

name, as the debtor might have had if the decree in bankruptcy had not been rendered and no assignment had been made. If at the time of the commencement of the proceedings in bankruptcy, an action is pending in the name of the debtor for the recovery of a debt or other thing which might or ought to pass to the assignee by the assignment, the assignee shall, if he requires it, be admitted to prosecute the action in his own name, in like mahner and with like effect as if it had been originally commenced by him. And if any suit at law or in equity, in which the bankrupt is a party in his own name, is pending at the time of the adjudication of bankruptcy, the assignee may defend the same in the same manner and with the like effect as it might have been defended by the bankrupt.

No abatement by death or removal. Sec. 5048. No suit pending in the name of the assignee shall be abated by his death or removal; but upon the motion of the surviving or remaining or new assignee, as the case may be, he shall be admitted to prosecute the suit in like manner and with like effect as if it had been originally commenced by him.

Copy of assignment conclusive evidence of title. Sec. 5049. A copy duly certified by the clerk of the court, under the seal thereof, of the assignment, shall be conclusive evidence of the title of the assignee to take, hold, sue for, and recover the property of the bankrupt.

Bankrupt's books of account. Sec. 5050. No person shall be entitled, as against the assignee, to withhold from him possession of any books of account of the bankrupt, or claim any lien thereon.

Debtor must execute instruments. Sec. 5051. The debtor shall, at the request of the assignee and at the expense of the estate, make and execute any instruments, deeds, and writings which may be proper to enable the assignee to possess himself fully of all the assets of the bankrupt.

Chattel mortgages. Sec. 5052. No mortgage of any vessel or of any other goods or chattels, made as security for any debt, in good faith and for a present consideration and otherwise valid, and duly recorded pursuant to any statute of the United States or of any State, shall be invalidated or affected by an assignment in bankruptcy.

Trust property. Sec. 5053. No property held by the bankrupt in trust shall pass by the assignment.

Notice of appointment of assignee and record of assignment. Sec. 5054. The assignee shall immediately give notice of his appointment, by publication at least once a week for three consecutive weeks in such newspapers as shall for that purpose be designated by the court, due regard being had to their general circulation in the district or in that portion of the district in which the bankrupt and his creditors shall reside, and shall, within six months, cause the assignment to him to be recorded in every registry of deeds or other office within the United States where a conveyance of any lands owned by the

Lankrupt ought by law to be recorded. [And the record of such assignment, or of a duly certified copy thereof, shall be evidence thereof in all courts.]

Assignee to demand and receive all assigned estate. Sec. 5055. The assignee shall demand and receive, from all persons holding the same, all the estate assigned or intended to be assigned.

Notice prior to suit against assignee. Sec. 5056. No person shall be entitled to maintain an action against an assignee in bankruptcy for anything done by him as such assignee, without previously giving him twenty days' notice of such action, specifying the cause thereof, to the end that such assignee may have an opportunity of tendering amends, should he see fit to do so.

Time of commencing suits. Sec. 5057. No suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee. And this provision shall not in any case revive a right of action barred at the time when an assignee is appointed.

Assignee's accounts of money received. Sec. 5058. The assignee shall keep a regular account of all money received by him as assignee, to which every creditor shall, at reasonable times, have free resort.

Assignee to keep money and goods separate. Sec. 5059. The assignee shall, as soon as may be after receiving any money belonging to the estate, deposit the same in some bank in his name as assignee, or otherwise keep it distinct from all other money in his possession; and shall, as far as practicable, keep all goods and effects belonging to the estate separate from all other goods in his possession, or designated by appropriate marks, so that they may be easily and clearly distinguished, and may not be liable to be taken as his property or for the payment of his debts.

Temporary investment of money. Sec. 5060. When it appears that the distribution of the estate may be delayed by litigation or other cause, the court may direct the temporary investment of the money belonging to such estate in securities to be approved by the judge or register, or may authorize it to be deposited in any convenient bank, upon such interest, not to exceed the legal rate, as the bank may contract with the assignee to pay thereon.

Arbitration. Sec. 5061. The assignee, under the direction of the court, may submit any controversy arising in the settlement of demands against the estate, or of debts due to it, to the determination of arbitrators to be chosen by him and the other party to the controversy, and, under such direction, may compound and settle any such controversy, by agreement with the other party, as he thinks proper and most for the interest of the creditors.

Assignee to sell property. SEC. 5062. The assignee shall sell all

such unincumbered estate, real and personal, which comes into his hands, on such terms as he thinks most for the interest of the creditors; but upon petition of any person interested, and for cause shown, the court may make such order concerning the time, place, and manner of sale as will, in its opinion, prove to the interest of the creditors.

Sale of disputed property. SEC. 5063. Whenever it appears to the satisfaction of the court that the title to any portion of an estate, real or personal, which has come into possession of the assignee, or which is claimed by him, is in dispute, the court may, upon the petition of the assignee, and after such notice to the claimant, his agent or attorney, as the court shall deem reasonable, order it to be sold, under the direction of the assignee, who shall hold the funds received in place of the estate disposed of; and the proceeds of the sale shall be considered the measure of the value of the property in any suit or controversy between the parties in any court. But this provision shall not prevent the recovery of the property from the possession of the assignee by any proper action commenced at any time before the court orders the sale.

Sale of uncollectable assets. Sec. 5064. The assignee may sell and assign, under the direction of the court and in such manner as the court shall order, any outstanding claims or other property in his hands, due or belonging to the estate, which can not be collected and received by him without unreasonable or inconvenient delay or expense.

Sale of perishable property. Sec. 5065. When it appears to the satisfaction of the court that the estate of the debtor, or any part thereof, is of a perishable nature, or liable to deteriorate in value, the court may order the same to be sold, in such manner as may be deemed most expedient, under the direction of the messenger or assignee, as the case may be, who shall hold the funds received in place of the estate disposed of.

Discharge of liens. Sec. 5066. The assignee shall have authority, under the order and direction of the court, to redeem or discharge any mortgage or conditional contract, or pledge or deposit, or lien upon any property, real or personal, whenever payable, and to tender due performance of the condition thereof, or to sell the same subject to such mortgage, lien, or other incumbrance.

Provable debts. Sec. 5067. All debts due and payable from the bankrupt at the time of the commencement of proceedings in bankruptcy, and all debts then existing but not payable until a future day, a rebate of interest being made when no interest is payable by the terms of the contract, may be proved against the estate of the bankrupt. All demands against the bankrupt for or on account of any goods or chattels wrongfully taken, converted, or withheld by him may be proved and allowed as debts to the amount of the value of the property so taken or withheld, with interest. When the bankrupt is liable for unliquidated damages arising out of any contract or promise, or on account of any goods or chattels wrongfully taken,

converted, or withheld, the court may cause such damages to be assessed in such mode as it may deem best, and the sum so assessed may be proved againt the estate.

Contingent debts. Sec. 5068. In all cases of contingent debts and contingent liabilities contracted by the bankrupt, and not herein otherwise provided for, the creditor may make claim therefor, and have his claim allowed, with the right to share in the dividends, if the contingency happens before the order for the final dividend; or he may, at any time, apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall then be done in such manner as the court shall order, and he shall be allowed to prove for the amount so ascertained.

Liability of bankrupt as surety. Sec. 5069. When the bankrupt is bound as drawer, indorser, surety, bail, or guarantor upon any bill, bond, note, or any other specialty or contract, or for any debt of another person, but his liability does not become absolute until after the adjudication of bankruptcy, the creditor may prove the same after such liability becomes fixed, and before the final dividend is declared.

Sureties for bankrupt. Sec. 5079. Any person liable as bail, surety, guarantor, or otherwise for the bankrupt, who shall have paid the debt, or any part thereof, in discharge of the whole, shall be entitled to prove such debt or to stand in the place of the creditor if the creditor has proved the same, although such payments shall have been made after the proceedings in bankruptcy were commenced. And any person so liable for the bankrupt, and who has not paid the whole of such debt, but is still liable for the same or any part thereof, may, if the creditor fails or omits to prove such debt, prove the same either in the name of the creditor or otherwise, as may be provided by the general orders, and subject to such regulations and limitations as may be established by such general orders.

Debts falling due at stated periods. Sec. 5071. Where the bankrupt is liable to pay rent or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof up to the time of the bankruptcy, as if the same grew due from day to day, and not at such fixed and stated periods.

No other debts provable. Sec. 5072. No debts other than those specified in the five preceding sections shall be proved or allowed against the estate.

Set-offs. Sec. 5073. In all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt-set off against the other, and the balance only shall be allowed or paid; but no set-off shall be allowed in favor of any debtor to the bankrupt of a claim in its nature not provable against the estate, or of a claim purchased by or transferred to him after the filing of the petition.

Distinct liabilities. SEC. 5074. When the bankrupt, at the time of adjudication, is liable upon any bill of exchange, promissory note, or

other obligation in respect of distinct contracts as a member of two or more firms carrying on separate and distinct trades, and having distinct estates to be wound up in bankruptcy, or as a sole trader and also a member of a firm, the circumstance that such firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof and receipt of dividend in respect of such distinct contracts against the estates respectively liable upon such contracts.

Secured debts. Sec. 5075. When a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt. he shall be admitted as a creditor only for the balance of the debt after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the court shall direct; or the creditor may release or convey his claim to the assignee upon such property, and be admitted to prove his whole debt. If the value of the property exceeds the sum for which it is so held as security, the assignee may release to the creditor the bankrupt's right of redemption therein on receiving such excess; or he may sell the property subject to the claim of the creditor thereon; and in either case the assignee and creditor, respectively, shall execute all deeds and writings necessary or proper to consummate the transaction. If the property is not so sold or released and delivered up, the creditor shall not be allowed to prove any part of his debt.

Proof of debt. Sec. 5076. Creditors residing within the judicial district where the proceedings in bankruptcy are pending shall prove their debts before one of the registers of the court, or before a commissioner of the circuit court, within the said district. Creditors residing without the district, but within the United States, may prove their debts before a register in bankruptcy, or a commissioner of a circuit court, in the judicial district where such creditor, or either one of joint creditors, reside; but proof taken before a commissioner, shall be subject to revision by the register of the court.

Creditor's oath. Sec. 5077. To entitle a claimant against the estate of a bankrupt to have his demand allowed, it must be verified by a deposition in writing, under oath, and signed by the deponent, setting forth the demand, the consideration thereof, whether any and what securities are held therefor, and whether any and what payments have been made thereon; that the sum claimed is justly due from the bankrupt to the claimant; that the claimant has not, nor has any other person, for his use, received any security or satisfaction whatever other than that by him set forth; that the claim was not procured for the purpose of influencing the proceedings in bankruptcy; and that no bargain or agreement, express or implied, has been made or entered into, by or on behalf of such creditor, to sell, transfer, or dispose of the claim, or any part thereof, or to take or

receive, directly or indirectly, any money, property, or consideration whatever, whereby the vote of such creditor for assignee, or any action on the part of such creditor, or any other person in the proceedings, is or shall be in any way affected, influenced or controlled. No claim shall be allowed unless all the statements set forth in such deposition shall appear to be true.

Oath, by whom made. Sec. 5078. Such oath shall be made by the claimant, testifying of his own knowledge, unless he is absent from the United States or prevented by some other good cause from testifying, in which case the demand may be verified by the attorney or authorized agent of the claimant, testifying to the best of his knowledge, information, and belief, and setting forth his means of knowledge. Corporations may verify their claims by the oath of their president, cashier, or treasurer. The court may require or receive further pertinent evidence either for or against the admission of any claim.

Oath, before whom taken; proof sent to register. Sec. 5079. Such oath may be taken in any district before any register or any commissioner of the circuit court authorized to administer oaths; or, if the creditor is in a foreign country, before any minister, consul, or vice-consul of the United States. When the proof is so made it shall be delivered or sent by mail to the register having charge of the same.

Proof to be sent to assignee. Sec. 5080. If the proof is satisfactory to the register it shall be delivered or sent by mail to the assignee, who shall examine the same and compare it with the books and accounts of the bankrupt, and shall register, in a book to be kept by him for that purpose, the names of creditors who have proved their claims, in the order in which such proof is received, stating the time of receipt of such proof, and the amount and nature of the debts. Such books shall be open to the inspection of all the creditors. The court may require or receive further pertinent evidence either for or against the admission of any claim.

Examination by court into proof of claims. Sec. 5081. The court may, on application of the assignee, or of any creditor, or of the bankrupt, or without any application, examine upon oath the bankrupt, or any person tendering or who has made proof of a claim, and may summon any person capable of giving evidence concerning such proof, or concerning the debt sought to be proved, and shall reject all claims not duly proved, or where the proof shows the claim to be founded in fraud, illegality or mistake.

Withdrawal of papers. Sec. 5082. A bill of exchange, promissory note, or other instrument, used in evidence upon the proof of a claim, and left in court or deposited in the clerk's office, may be delivered, by the register or clerk having the custody thereof, to the person who used it, upon his filing a copy thereof, attested by the clerk of the court, who shall indorse upon it the name of the party against

whose estate it has been proved, and the date and amount of any dividend declared thereon.

Postponement of proof. Sec. 5083. When a claim is presented for proof before the election of the assignee, and the judge or register entertains doubts of its validity or of the right of the creditor to prove it, and is of the opinion that such validity or right ought to be investigated by the assignee, he may postpone the proof of the claim until the assignee is chosen.

Surrender of preferences. Sec. 5084. Any person who, since the second day of March, eighteen hundred and sixty-seven, has accepted any preference, having reasonable cause to believe that the same was made or given by the debtor, contrary to any provisions of the act of March two, eighteen hundred and sixty-seven, chapter one hundred and seventy-six, to establish a uniform system of bankruptcy, or to any provisions of this Title, shall not prove the debt or claim on account of which the preference is made or given, nor shall he receive any dividend therefrom until he shall first surrender to the assignee all property, money, benefit, or advantage received by him under such preference.

Allowance and list of debts. Sec. 5085. The court shall allow all debts duly proved, and shall cause a list thereof to be made and certified by one of the registers.

Examination of bankrupt. Sec. 5086. The court may, on the application of the assignee, or of any creditor, or without any application, at all times require the bankrupt, upon reasonable notice, to attend and submit to an examination, on oath, upon all matters relating to the disposal or condition of his property, to his trade and dealings with others, to his accounts concerning the same, to all debts due to or claimed from him, and to all other matters concerning his property and estate and the due settlement thereof according to law. Such examination shall be in writing, and shall be signed by the bankrupt and filed with the other proceedings.

Examination of witness. Sec. 5087. The court may, in like manner, require the attendance of any other person as a witness, and if such person fails to attend, on being summoned thereto, the court may compel his attendance by warrant directed to the marshal, commanding him to arrest such person and bring him forthwith before the court, or before a register in bankruptcy, for examination as a witness.

**Examination of bankrupt's wife.** Sec. 5088. For good cause shown, the wife of any bankrupt may be required to attend before the court to the end that she may be examined as a witness; and if she does not attend at the time and place specified in the order, the bankrupt shall not be entitled to a discharge unless he proves to the satisfaction of the court that he was unable to procure her attendance.

Examination of imprisoned or disabled bankrupt. SEC. 5089. If the bankrupt is imprisoned, absent, or disabled from attendance, the

court may order him to be produced by the jailer, or any officer in whose custody he may be, or may direct the examination to be had, taken, and certified at such time and place and in such manner as the court may deem proper, and with like effect as if such examination had been had in court.

No abatement upon death of debtor. Sec. 5090. If the debtor dies after the issuing of the warrant, the proceedings may be continued and concluded in like manner as if he had lived.

Distribution of bankrupt's estate. Sec. 5091. All creditors whose debts are duly proved and allowed shall be entitled to share in the bankrupt's property and estate, pro rata, without any priority or preference whatever, except as allowed by section fifty-one hundred and one. No debt proved by any person liable, as bail, surety, guarantor, or otherwise, for the bankrupt, shall be paid to the person so proving the same until satisfactory evidence shall be produced of the payment of such debt by such person so liable, and the share to which such debt would be entitled may be paid into court, or otherwise held for the benefit of the party entitled thereto, as the court may direct.

Second meeting of creditors. Sec. 5092. At the expiration of three months from the date of the adjudication of bankruptcy in any case, or as much earlier as the court may direct, the court, upon request of the assignee, shall call a general meeting of the creditors, of which due notice shall be given, and the assignee shall then report, and exhibit to the court and to the creditors just and true accounts of all. his receipts and payments, verified by his oath, and he shall also produce and file vouchers for all payments for which vouchers are required by any rule of the court; he shall also submit the schedule of the bankrupt's creditors and property as amended, duly verified by the bankrupt, and a statement of the whole estate of the bankrupt as then ascertained, of the property recovered and the property outstanding, specifying the cause of its being outstanding, and showing what debts or claims are yet undetermined, and what sum remains in his hands. The majority in value of the creditors present shall determine whether any and what part of the net proceeds of the estate, after deducting and retaining a sum sufficient to provide for all undetermined claims which, by reason of the distant residence of the creditor, or for other sufficient reason, have not been proved, and for other expenses and contingencies, shall be divided among the creditors; but unless at least one-half in value of the creditors attend the meeting, either in person or by attorney, it shall be the duty of the assignee so to determine.

Third meeting of creditors. Sec. 5093. Like proceedings shall be had at the expiration of the next three months, or earlier, if practicable, and a third meeting of creditors shall then be called by the court, and a final dividend then declared, unless any suit at law or in equity is pending, or unless some other estate or effects of the debtor after-

ward come to the hands of the assignee in the case of the assignee shall, as soon as may be, convert such estate and effects into money, and within two months after the same are so converted they shall be divided in manner aforesaid. Further dividends shall be made in like manner as often as occasion requires, and after the third meeting of creditors no further meeting shall be called unless ordered by the court.

Notice of meetings. Sec. 5094. The assignee shall give such notice to all known creditors, by mail or otherwist, of all meetings, after the first, as may be ordered by the court.

Creditor may act by attorney. Sec. 5095. Any creditor may act at all meetings by his duly constituted attorney the same as though personally present.

Set Lement of assignee's account. Sec. 5096. Preparatory to the final dividend, the assignee shall submit his account to the court and file the same, and give notice to the creditors of such filing, and shall also give notice that he will apply for a settlement of his account, and for a discharge from all liability as assignee, at a time to be specified in such notice, and at such time the court shall audit and pass the accounts of the assignee, and the assignee shall, if required by the court, be examined as to the truth of his account, and if it is found correct he shall thereby be discharged from all liability as assignee to any creditor of the bankrupt. The court shall thereupon order a dividend of the estate and effects, or of such part thereof as it sees fit, among such of the creditors as have proved their claims, in proportion to the respective amount of their debts.

Dividend not to be disturbed. SEC. 5097. No dividend already declared shall be disturbed by reason of debts being subsequently proved, but the creditors proving such debts shall be entitled to a dividend equal to those already received by the other creditors before any further payment is made to the latter.

Omission of assignee to call meetings. Sec. 5098. If by accident, mistake, or other cause, without fault of the assignee, either or both of the second or third meetings should not be held within the times limited, the court may, upon motion of an incrested party, order such meetings, with like effect as to the validity of the proceedings as if meeting had been duly held.

Compensation of assignee. Sec. 5099. The assignee shall be allowed, and may retain out of money in his hands, all the necessary disbursements made by him in the discharge of his duty, and a reasonable compensation for his services, in the discretion of the court.

Commissioners. Sec. 5100. In addition to all expenses necessarily incurred by him in the execution of his trust, in any case, the assignee shall be entitled to an allowance for his services in such case on all moneys received and paid out by him therein, for any sum not exceeding one thousand dollars, five per centum thereon; for any larger sum, not exceeding five thousand dollars, two and a half per

centum on the excess of over one thousand dollars; and for any larger sum, one per centum on the excess over five thousand dollars. If, at any time, there is not in his hands a sufficient amount of money to defray the necessary expenses required for the further execution of his trust, he shall not be obliged to proceed therein until the necessary funds are advanced or satisfactorily secured to him.

Debts entitled to priority. Sec. 5101. In the order for a dividend, the following claims shall be entitled to priority, and to be first paid in full in the following order:

First. The fees, costs, and expenses of suits, and of the several proceedings in bankruptcy under this Title, and for the custody of property, as herein provided.

Second. All debts due to the United States, and all taxes and assessments under the laws thereof.

Third. All debts due to the State in which the proceedings in bankruptcy are pending, and all taxes and assessments made under the laws thereof.

Fourth. Wages due to any operative, clerk, or house-servant, to an amount not exceeding fifty dollars, for labor performed within six months next preceding the first publication of the notice of the proceedings in bankruptcy.

Fifth. All debts due to any person who, by the laws of the United States, are, or may be, entitled to a priority, in like manner as if the provisions of this Title had not been adopted. But nothing contained in this Title shall interfere with the assessment and collection of taxes by the authority of the United States or any State.

Notice of dividend to each creditor. Sec. 5102. Whenever a dividend is ordered, the register shall, within ten days after the meeting, prepare a list of creditors entitled to dividend, and shall calculate and set opposite to the name of each creditor who has proved his claim the dividend to which he is entitled out of the net proceeds of the estate set apart for dividend, and shall forward, by mail, to every creditor a statement of the dividend to which he is entitled, and such creditors shall be paid by the assignee in such manner as the court may direct.

Settlement of bankrupt estates by trustees. Composition with creditors. Sec. 5103. If at the first meeting of creditors, or at any meeting of creditors specially called for that purpose, and or which previous notice shall have been given for such length of time and in such manner as the court may direct, three-fourths in value of the creditors whose claims have been proved shall resolve that it is for the interest of the general body of the creditors that the estate of the bankrupt shall be settled by trustees, under the inspection and direction of a committee of the creditors, the creditors may certify and report such resolution to the court, and may nominate one or more trustees to take and hold and distribute the estate, under the direction of such committee. If it appears, after hearing the bankrupt and

such creditors as desire to be heard, that the resolution was duly passed, and that the interest of the creditors will be promoted thereby, the court shall confirm it; and upon the execution and filing, by or on behalf of three-fourths in value of all the creditors whose claims have been proved, of a consent that the estate of the bankrupt shall be wound up and settled by trustees, according to the terms of such resolution, the bankrupt, or, if an assignee has been appointed, the assignee, shall, under the direction of the court, and under oath, convey, transfer, and deliver all the property and estate of the bank! rupt to the trustees, who shall, upon such conveyance and transfer. have and hold the same in the same manner, and with the same powers and rights, in all respects, as the bankrupt would have had or held the same if no proceedings in bankruptcy had been taken, or as the assignee in bankruptcy would have done, had such resolution not been passed. Such consent and the proceedings under it shall be as binding in all respects on any creditor whose debt is provable, who has not signed the same, as if he had signed it, and on any creditor whose debt, if provable, is not proved, as if he had proved it. court, by order, shall direct all acts and things needful to be done to carry into effect such resolution or the creditors, and the trustees shall proceed to wind up and settle the estate under the direction and inspection of such committee of the creditors, for the equal benefit of all such creditors; and the winding up and settlement of any estate under the provisions of this section shall be deemed to be proceedings in bankruptcy; and the trustees shall have all the rights and powers of assignees in bankruptcy. The court, on the application of such trustees, shall have the power to summon and examine, on oath or otherwise, the bankrupt, or any creditor, or any person indebted to the estate, or known or suspected of having any of the estate in his possession, or any other person whose examination may be material or necessary to aid the trustees in the execution of their trust, and to compel the attendance of such persons and the production of books and papers in the same manner as in other proceedings in bankruptcy; and the bankrupt shall have the like right to apply for and obtain a discharge after the passage of such resolution and the appointment of such trustees as if such resolution had not been passed, and as if all the proceedings had continued in the manner provided in the preceding sections of this Title. If the resolution is not duly reported, or the consent of the creditors is not duly filed, or if, upon its filing, the court does not think fit to approve thereof, the bankruptcy shall proceed as if no resolution had been passed, and the court may make all necessary orders for resuming the proceedings, And the period of time which shall have elapsed between the date of the resolution and the date of the order for resuming proceedings shail not be reckoned in calculating periods of time prescribed by this Title.

#### CHAPTER FIVE.

### PROTECTION AND DISCHARGE OF BANKRUPTS.

Bankrupt subject to orders of court. Sec. 5104. The bankrupt shall at all times, until his discharge, be subject to the order of the court, and shall, at the expense of the estate, execute all proper writings and instruments, and do all acts required by the court touching the assigned property or estate, and to enable the assignee to demand, recover, and receive all the property and estate assigned, wherever situated. For neglect or refusal to obey any order of the court, the bankrupt may be committed and punished as for a contempt of court. If the bankrupt is without the district, and unable to return and personally attend at any of the times or do any of the acts which may be required pursuant to this section, and it appears that such absence was not caused by willful default, and if, as soon as may be after the removal of such impediment, he offers to attend and submit to the order of the court in all respects, he shall be permitted so to do, with like effect as if he had not been in default.

Waiver of suit by proof of debt. Sec. 5105. No creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action against him; and all proceedings already commenced or unsatisfied judgments already obtained thereon against the bankrupt shall be deemed to be discharged and surrendered thereby.

Stay of suits. Sec. 5106. No creditor whose debt is provable shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debt-or's discharge shall have been determined; and any such suit or proceedings shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of the discharge, provided there is no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge, and provided, also, that if the amount due the creditor is in dispute, the suit, by leave of the court in bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy, but execution shall be stayed.

Exemption from arrest. Sec. 5107. No bankrupt shall be liable during the pendency of the proceedings in bankruptcy to arrest in any civil action, unless the same is founded on some debt or claim from which his discharge in bankruptcy would not release him.

Application for discharge. Sec. 5108. (At any time after the expiration of six months from the adjudication of bankruptcy, or if no debts have been proved against the bankrupt, or if no assets have come to the hands of the assignee, at any time after the expiration of sixty days, and within one year from the adjudication of bankruptcy, the bankrupt

may apply to the court for a discharge from his debts.) (At any time after the expiration of six months from the adjudication of bankruptcy, or if no debts have been proved against the bankrupt, or if no assets have come to the hands of the assignee, at any time after the expiration of sixty days, and before the final disposition of the cause, the bankrupt may apply to the court for a discharge from his debts. This section shall apply in all cases heretofore or hereafter commenced.)

Notice to creditors. Sec. 5109. Upon application for a discharge being made the court shall order notice to be given by mail to all creditors who have proved their debts, and by publication at least once a week in such newspapers as the court shall designate, due regard being had to the general circulation of the same in the district, or in that portion of the district in which the bankrupt and his creditors shall reside to appear on a day appointed for that purpose, and show cause why a discharge should not be granted to the bankrupt.

Grounds for opposing discharge. Sec. 5110. No discharge shall be granted, or, if granted, shall be valid, in any of the following cases:

First. If the bankrupt has willfully sworn falsely in his affidavit annexed to his petition, schedule, or inventory, or upon any examination in the course of the proceedings in bankruptcy, in relation to any material fact.

Second. If the bankrupt has concealed any part of his estate or effects, or any books or writings relating thereto, or has been guilty of any fraud or negligence in the care, custody, or delivery to the assignee of the property belonging to him at the time of the presentation of his petition and inventory, excepting such property as he is permitted to retain under the provisions of this Title, or if he has caused, permitted, or suffered any loss, waste, or destruction thereof.

Third. If, within four months before the commencement of such proceedings, the bankrupt has procured his lands, goods, money, or chattels to be attached, sequestered, or seized on execution.

Fourth. If, at any time after the second day of March, eighteen hundred and sixty-seven, the bankrupt has destroyed, mutilated, altered, or falsified any of his books, documents, papers, writings, or securities, or has made or been privy to making of any false or fraudulent entry in any book of account or other document, with intent to defraud his creditors; or has removed or caused to be removed any part of his property from the district, with intent to defraud his creditors.

Fifth. If the bankrupt has given any fraudulent preferences contrary to the provisions of the act of March two, eighteen hundred and sixty-seven, to establish a uniform system of bankruptcy, or to the provisions of this Title, or has made any fraudulent payment, gift, transfer, conveyance, or assignment of any part of his property, or

has lost any part thereof in gaming, or has admitted a false or fictitious debt against his estate.

Sixth. If the bankrupt, having knowledge that any person has proved such false and fictitious debt, has not disclosed the same to his assignee within one month after such knowledge.

Seventh. If the bankrupt, being a merchant or tradesman, has not, at all times after the second day of March, eighteen hundred and sixty-seven, kept proper books of account.

Eighth. If the bankrupt, or any person in his behalf, has procured the assent of any creditor to the discharge, or influenced the action of any creditor at any stage of the proceedings, by any pecuniary consideration or obligation.

Ninth. If the bankrupt has, in contemplation of becoming bankrupt, made any pledge, payment, transfer, assignment, or conveyance of any part of his property, directly or indirectly, absolutely or conditionally, for the purpose of preferring any creditor or person having a claim against him, or who is or may be under liability for him, or for the purpose of preventing the property from coming into the hands of the assignee, or of being distributed in satisfaction of his debts.

Tenth. If the bankrupt has been convicted of any misdemeanor under this Title.

Specification of grounds of opposition. Sec. 5111. Any creditor opposing the discharge of any bankrupt may file a specification in writing of the grounds of his opposition, and the court may in its discretion order any question of fact so presented to be tried at a stated session of the district court.

Assets equal to fifty per cent. required. SEC. 5112. In all proceedings in bankruptcy commenced after the first day of January, eighteen hundred and sixty-nine, no discharge shall be granted to a debtor whose assets shall not be equal to fifty per centum of the claims proved against his estate upon which he shall be liable as the principal debtor, unless the assent in writing of a majority in number and value of his creditors to whom he shall have become liable as principal debtor, and who shall have proved their claims, as filed in the case at or before the time of the hearing of the application for discharge; but this provision shall not apply to those debts from which the bankrupt seeks a discharge which were contracted prior to the first day of January, eighteen hundred and sixty-nine.

Final oath of bankrupt. Sec. 5113. Before any discharge is granted, the bankrupt must take and subscribe an oath to the effect that he has not done, suffered, or been privy to any act, matter, or thing specified as a ground for withholding such discharge, or as invalidating such discharge if granted.

Discharge of bankrupt. Sec. 5114. If it shall appear to the court that the bankrupt has in all things conformed to his duty under this Title, and that he is entitled, under the provisions thereof, to receive

a discharge, the court shall grant him a discharge from all his debts except as hereinafter provided, and shall give him a certificate thereof under the seal of the court.

Form of certificate of discharge. Sec. 5115. The certificate of a discharge in bankruptcy shall be in substance in the following form:

District court of the United States, district of

Whereas has been duly adjudged a bankrupt under the Revised Statutes of the United States, Title "Bankruptcy," and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by the court that said

be forever discharged from all debts and claims which by said Title are made provable against his estate, and which existed on the

day of , on which day the petition for adjudication was filed by (or against) him; excepting such debts, if any, as are by law excepted from the operation of a discharge in bankruptcy. Given under my hand and the seal of the court at , in the said district, this day of ,

(Seal.) , Judge.

Second bankruptcy. Sec. 5116. No person who has been discharged, and afterwards becomes bankrupt on his own application, shall be again entitled to a discharge whose estate is insufficient to pay seventy per centum of the debts proved against it, unless the assent in writing of three-fourths in value of his creditors who have proved their claims is filed at or before the time of application for discharge; but a bankrupt who proves to the satisfaction of the court that he has paid all the debts owing by him at the time of any previous bankruptcy, or who has been voluntarily released therefrom by his creditors, shall be entitled to a discharge in the same manner and with the same effect as if he had not previously been bankrupt.

Certain debts not released. Sec. 5117. No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy; but the debt may be proved, and the dividend thereon shall be a payment on account of such debt.

Liability of other persons not released. Sec. 5118. No discharge shall release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety, or otherwise.

Effect of discharge. Sec. 5119. A discharge in bankruptcy duly granted shall, subject to the limitations imposed by the two preceding sections, release the bankrupt from all debts, claims, liabilities, and demands which were or might have been proved against his estate in bankruptcy. It may be pleaded by a simple averment that on the day of its date such discharge was granted to the bankrupt, setting a full copy of the same forth in its terms as a full and complete bar to all suits brought on any such debts, claims, liabilities, or demands. The

certificate shall be conclusive evidence in favor of such bankrupt of the fact and the regularity of such discharge.

Application to annul discharge. SEC. 5120. Any creditor of a bankrupt, whose debt was proved or provable against the estate in bankruptcy, who desires to contest the validity of the discharge on the ground that it was fraudulently obtained, may, at any time within two years after the date thereof, apply to the court which granted it to annul the same. The application shall be in writing, and shall specify which, in particular, of the several acts mentioned in section fifty-one hundred and ten it is intended to prove against the bankrupt, and set forth the grounds of avoidance; and no evidence shall be admitted as to any other such acts; but the application shall be subject to amendment at the discretion of the court. The court shall cause reasonable notice of the application to be given to the bankrupt, and order him to appear and answer the same, within such time as to the court shall seem proper. If, upon the hearing of the parties, the court finds that the fraudulent acts, or any of them, set forth by the creditor against the bankrupt, are proved, and that the creditor had no knowledge of the same until after the granting of the discharge, judgment shall be given in favor of the creditor, and the discharge of the bankrupt shall be annulled. But if the court finds that the fraudulent acts and all of them so set forth are not proved, or that they were known to the creditors before the granting of the discharge, judgment shall be rendered in favor of the bankrupt, and the validity of his discharge shall not be affected by the proceedings.

#### CHAPTER SIX.

PROCEEDINGS PECULIAR TO PARTNERSHIPS AND CORPORATIONS.

Bankruptcy of partnerships. SEC. 5121. Where two or more persons who are partners in trade are adjudged bankrupts, either on the petition of such partners or of any one of them, or on the petition of any creditor of the partners, a warrant shall issue, in the manner provided by this Title, upon which all the joint stock and property of the copartnership, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as are hereinbefore excepted. All the creditors of the company, and the separate creditors of each partner, may prove their respective debts. assignee shall be chosen by the creditors of the company. He shall keep separate accounts of the joint stock or property of the copartnership and of the separate estate of each member thereof; and after deducting out of the whole amount received by the assignee the whole of the expenses and disbursements, the net proceeds of the joint stock shall be appropriated to pay the creditors of the copartnership, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors. If there is any

balance of the separate estate of any partner, after the payment of his separate debts, such balance shall be added to the joint stock for the payment of the joint creditors; and if there is any balance of the joint stock after payment of the joint debts, such balance shall be appropriated to and divided among the separate estates of the several partners according to their respective right and interest therein, and as it would have been if the partnership had been dissolved without any bankruptcy; and the sum so appropriated to the separate estate of each partner shall be applied to the payment of his separate debts. The certificate of discharge shall be granted or refused to each partner as the same would or ought to be if the proceedings had been against him alone. In all other respects the proceedings against partners shall be conducted in the like manner as if they had been commenced and prosecuted against one person alone. If such copartners reside in different districts, that court in which the petition is first filed shall retain exclusive jurisdiction over the case.

Of corporations and joint-stock companies. SEC. 5122. The provisions of this Title shall apply to all moneyed business or commercial corporations and joint-stock companies, and upon the petition of any officer of any such corporation or company, duly authorized by a vote of a majority of the corporators at any legal meeting called for the purpose, or upon the petition of any creditor of such corporation or company, made and presented in the manner provided in respect to debtors, the like proceedings shall be had and taken as are provided in the case of debtors. All the provisions of this Title which apply to the debtor, or set forth his duties in regard to furnishing schedules and inventories, executing papers, submitting to examinations, disclosing, making over, secreting, concealing, conveying, assigning, or paying away his money or property, shall in like manner, and with like force, effect, and penalties, apply to each and every officer of such corporations or company in relation to the same matters concerning the corporation or company, and the money and property thereof. All payments, conveyances, and assignments declared fraudulent and void by this Title when made by a debtor, shall in like manner, and to the like extent, and with like remedies, be fraudulent and void when made by a corporation or company. Whenever any corporation by proceedings under this Title is declared bankrupt, all its property and assets shall be distributed to the creditors of such corporations in the manner provided in this Title in respect to natural persons. But no allowance or discharge shall be granted to any corporation or jointstock company, or to any person or officer or member thereof.

Authority of State courts in proceedings against corporations, &c. Sec. 5123. Whenever a corporation created by the laws of any State, whose business is carried on wholly within the State creating the same, and also any insurance company so created, whether all its business shall be carried on in such State or not, has had proceedings duly commenced against such corporation or company before the

courts of such State for the purpose of winding up the affairs of such corporation or company and dividing its assets ratably among its creditors and lawfully among those entitled thereto prior to proceedings having been commenced against such corporation or company under the bankrupt laws of the United States, any order made, or that shall be made, by such court agreeably to the State law for the ratable distribution or payment of any dividend or assets to the creditors of such corporation or company while such State court shall remain actually or constructively in possession or control of the assets of such corporation or company shall be deemed valid notwithstanding proceedings in bankruptcy may have been commenced and be pending against such corporation or company.

## CHAPTER SEVEN.

#### FEES AND COSTS.

Fees. SEC. 5124. In each case there shall be allowed and paid, in addition to the fees of the clerk of the court as now established by law, or as may be established by general order for fees in bankruptcy, the following fees, which shall be applied to paying for the services of the registers:

First. For issuing every warrant, two dollars.

Second. For each day in which a meeting is held, three dollars.

Third. 'For each order for a dividend, three dollars.

Fourth. For every order substituting an arrangement by trust-deed for bankruptcy, two dollars.

Fifth. For every bond with sureties, two dollars.

Sixth. For every application for any meeting in any matter under this [act,] [Title,] one dollar.

Seventh. For every day's service while actually employed under a special order of the court, a sum not exceeding five dollars, to be allowed by the court.

Eighth. For taking depositions, the fees now allowed by law.

Ninth. For every discharge when there is no opposition, two dollars.

Such fees shall have priority of payment over all other claims out of the estate, and, before a warrant issues, the petitioner shall deposit with the clerk of the court fifty dollars as security for the payment thereof; and if there are not sufficient assets for the payment of the fees, the person upon whose petition the warrant is issued shall pay the same, and the court may issue an execution against him to compel payment to the register.

Traveling and incidental expenses. Sec. 5125. The traveling and incidental expenses of the register, and of any clerk or other officer attending him, shall be settled by the court in accordance with the rules prescribed by the justices of the Supreme Court, and paid out of

the assets of the estate in respect of which such register has acted; or if there are no such assets, or if the assets are insufficient, such expenses shall form a part of the costs in the case in which the register acts, to be apportioned by the judge.

Marshal's fees. SEC. 5126. Before any dividend is ordered, the assignee shall pay out of the estate to the messenger the following fees, and no more:

First. For service of warrant, two dollars.

Second. For all necessary travel, at the rate of five cents a mile each way.

Third. For each written note to creditor named in the schedule, ten cents.

Fourth. For custody of property, publication of notices, and other services, his actual and necessary expenses upon returning the same in specific items, and making oath that they have been actually incurred and paid by him, and are just and reasonable, the same to be taxed or adjusted by the court, and the oath of the messenger shall not be conclusive as to the necessity of such expenses.

. For cause shown, and upon hearing thereon, such further allowance may be made as the court, in its discretion, may determine.

Justices of Supreme Court may change tariff of fees. Sec. 5127. The enumeration of the foregoing fees shall not prevent the justices of the Supreme Court from prescribing a tariff of fees for all other services or the officers of courts of bankruptcy, or from reducing the fees prescribed in the three preceding sections, in classes of cases to be named in their general orders.

## CHAPTER EIGHT.

## PROHIBITED AND FRAUDULENT TRANSFERS.

Preferences by insolvent. Sec. 5128. If any person, being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures or suffers any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer, or conveyance, or to be benefited thereby, or by such attachment, having reasonable cause to believe such person is insolvent, and that such attachment, payment, pledge, assignment, or conveyance is made in fraud of the provisions of this Title, the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited.

Fraudulent transfers of property. Sec. 5129. If any person, being insolvent, or in contemplation of insolvency or bankruptcy, within six months before the filing of the petition by or against him, makes any payment, sale, assignment, transfer, conveyance, or other disposition of any part of his property to any person who then has reasonable cause to believe him to be insolvent, or to be acting in contemplation of insolvency, and that such payment, sale, assignment, transfer, or other conveyance is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under this [act] [Title,] or to defeat the object of, or in any way impair, hinder, impede, or delay the operation and effect of, or to evade any of the provisions of this Title, the sale, assignment, transfer, or conveyance shall be void, and the assignee may recover the property, or the value thereof, as assets of the bankrupt.

Presumptive evidence of fraud. Sec. 5130. The fact that such a payment, pledge, sale, assignment, transfer, conveyance, or other disposition of a debtor's property as is prescribed in the two preceding sections, is not made in the usual and ordinary course of business of the debtor, shall be prima facie evidence of fraud.

Fraudulent agreements. Sec. 5131. Any contract, covenant, or security made or given by a bankrupt or other person with, or in trust for, any creditor, for securing the payment of any money as a consideration for or with intent to induce the creditor to forbear opposing the application for a discharge of the bankrupt, shall be void; and any creditor who obtains any sum of money or other goods, chattels, or security from any person as an inducement for forbearing to oppose, or consenting to such application for discharge, shall forfeit all right to any share or dividend in the estate of the bankrupt, and shall also forfeit double the value or amount of such money, goods, chattels, or security so obtained, to be recovered by the assignee for the benefit of the estate.

Penalties against fraudulent bankrupt. Sec. 5132. Every person respecting whom proceedings in bankruptcy are commenced, either upon his own petition or upon that of a creditor:

First. Who secretes or conceals any property belonging to his estate; or,.

Second. Who parts with, conceals, destroys, alters, mutilates, or falsifies, or causes to be concealed, destroyed, altered, mutilated, or falsified, any book, deed, document, or writing relating thereto; or,

Third. Who removes or causes to be removed any such property or book, deed, document, or writing out of the district, or otherwise disposes of any part thereof, with intent to prevent it from coming into the possession of the assignee in bankruptcy, or to hinder, impede, or delay him in recovering or receiving the same; or,

Fourth. Who makes any payment, gift, sale, assignment, trans-

fer, or conveyance of any property belonging to his estate with the like intent; or,

Fifth. Who spends any property belonging to his estate in gaming; or,

Sixth. Who, with intent to defraud, wilfully and fraudulently conceals from his assignee or omits from his inventory any property or effects required by this Title to be described therein; or,

Seventh. Who, having reason to suspect that any other person has proved a false or fictitious debt against his estate, fails to disclose the same to his assignee within one month after coming to the knowledge or belief thereof; or,

Eighth. Who attempts to account for any of his property by fictitious losses or expenses; or,

Ninth. Who, within three months before the commencement of proceedings in bankruptcy, under the false color and pretense of carrying on business and dealing in the ordinary course of trade, obtains on credit from any person any goods or chattels with intent to defraud; or,

Tenth. Who, within three months next before the commencement of proceedings in bankruptcy, with intent to defraud his creditors, pawns, pledges, or disposes of, otherwise than by transactions made in good faith in the ordinary way of his trade, any of his goods or chattels which have been obtained on credit and remain unpaid for,

Shall be punishable by imprisonment, with or without hard labor, for not more than three years.

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